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Ms Shaamara Ally

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## Corporate Social Responsibility: Practices, Trends and Developments

### Summary of study

The concept of corporate social responsibility (CSR) has been the subject of a long standing debate amongst academics who have differed on whether or not companies should expend capital that rightly belongs to its shareholders to address concerns relating to society and the environment. World events such as the 2008 global financial crisis and the European debt crisis have created a greater hype around the manner in which corporates conduct their business. Globally, corporate scandals and failures have redirected attention to issues such as good governance, ethics, trust and accountability.<sup>1</sup>

Corporates have grown to realise that their footprints have a great impact on society, employees, customers, suppliers, local communities, shareholders and manufacturing partners.<sup>2</sup> Corporations are placing greater focus on their long term sustainability by developing strategic community and environmental investments in order to ensure their longevity and sustainability. CSR aims to ensure corporate responsibility towards the community,<sup>3</sup> by fulfilling obligations to a broader society and being responsible for their actions to society.<sup>4</sup>

Companies compliant with the concept purport to act in a socially responsible manner and decisions taken are focussed on ethical values, legal compliance, respect for society and the environment. It goes beyond satisfying a mere public relations exercise, legal or regulatory standards; what is demanded is that corporates that are good corporate citizens sensitise

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<sup>1</sup> Jamali, D et al. (2008) *Corporate Governance and Corporate Social Responsibility Synergies and Interrelationships*. p443. Available at: [http://www.aub.edu.lb/osb/csr/research/Documents/Strengths\\_relation\\_%2520of\\_SME\\_CSR.pdf](http://www.aub.edu.lb/osb/csr/research/Documents/Strengths_relation_%2520of_SME_CSR.pdf) Accessed 5 March 13.

<sup>2</sup> Thwaites, C. (2012) *Corporate Social Responsibility & Community Projects*. The Gordon Institute of Business Science Transnet Programme in Sustainable Development. p1-30.

<sup>3</sup> Walsh, M & Lowry, J. (2005) *CSR and corporate governance* in Mullerat, R. *Corporate social responsibility: the corporate governance of the 21<sup>st</sup> century*. p38.

<sup>4</sup> Naidoo, R. (2010) *Corporate Governance and essential guide for South African Companies*. 2<sup>nd</sup> Ed. Lexis Nexus. p 241.

themselves to the impact their operations have on all internal and external stakeholders.<sup>5</sup>

Globally corporations are responsible for generating the majority of the world's economic activity by being prominent players in all markets, ranging from the supplying of goods, the provision of services, to the provision of capital and human resources.<sup>6</sup> The ability of corporations to attract investments, generate profits and create employment has a direct bearing on the economic prosperity of the countries where these corporations are located.<sup>7</sup> Bakan reiterates that "a corporation is a pathological institution, a dangerous possessor of the great power it wields over people and societies."<sup>8</sup> Corporations have come to realize that good governance and social involvement go beyond the work performed in their own offices.<sup>9</sup> Recent global occurrences and economic trends require that corporates should amend their business practices in order to ensure future economic, social and environmental sustainability.

Our country with its unique history and its diverse general population is highly dependent on social assistance from the government.<sup>10</sup> This dependency can be attributed largely to the long standing apartheid regime that prevented the majority of its citizens from freely participating in economic practices. Academics have argued that companies acted as catalysts in promoting the apartheid regime by paying taxes to the

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<sup>5</sup> Op cit fn 4 at p241.

<sup>6</sup> Available at: <http://www.globaltrends.com/knowledge-center/features/shapers-and-influencers/66-corporate-clout-the-influence-of-the-worlds-largest-100-economic-entities>. Accessed on 5 August 13.

<sup>7</sup> De Ocampo, R F. (2000) The ABD-OECD World Bank 2<sup>nd</sup> Asian Round Table on Corporate Governance. *A Country Paper on corporate ownership and corporate governance: issues raised in the Philippines*. Asian Centre for Corporate Social. 31 May. Hong Kong.

<sup>8</sup> Bakan, J. (2005) *The Corporation: The Pathological Pursuit of Profit and Power*. Free Press. New York. p1.

<sup>9</sup> Corporate Social Responsibility in South Africa: More than a nice intention. (2011) *Consultancy Africa Intelligence*. Available at: <http://www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12>: Accessed on 24 April 13.

<sup>10</sup> Available at: <http://www.iol.co.za/news/south-africa/more-people-on-welfare-than-working1.1539021#.Uc1d0jtTCFg>: Accessed 28 June 13.

government that enforced segregation, divided labour forces in terms of race and promoted single sex hostels.<sup>11</sup>

Fig<sup>12</sup> further argues that looking at CSR from a South African perspective “requires corporates to take responsibility for their actions during the apartheid era and that they should do so by acknowledging and offering redress for violations of human rights.”<sup>13</sup> The increase in large scale public protests indicates that the current government cannot meet the basic needs of its citizens.<sup>14</sup> South Africa’s increasing genie coefficient<sup>15</sup> and the inability of the government to provide for its citizens are clear indications that an urgent intervention in the form of assistance from the private sector is required.

CSR as a concept has been debated globally at length, however in South Africa the concept is still relatively in its infant stages, though significant progress has been made. This study provides a general overview of the practices, trends and developments made towards the adoption of the concept of CSR within the global trading arena. The study also provides a bird’s eye view of strides made within the South African corporate governance sector towards encouraging corporates to adopt CSR as part of their everyday business.

The concept of CSR may have been widely received by developed countries however the question this paper debates is whether this concept and its principles serve as a possible contributory factor in solving South Africa’s

<sup>11</sup> See comment by Lipton, Schlemmer and R. W. Johnson in Fig, D. (2005) *Manufacturing amnesia: Corporate social responsibility in South Africa*, International Affairs. 81:3. p599-617.

<sup>12</sup> David Fig is a South African environmental sociologist, political economist, and activist. He holds a PhD from the London School of Economics, and specialises in questions of energy, trade, biodiversity, and corporate responsibility. Available at: [http://en.wikipedia.org/wiki/David\\_Fig](http://en.wikipedia.org/wiki/David_Fig): Accessed on 14 May 13.

<sup>13</sup> Op cit fn 11 at p601

<sup>14</sup> Service Delivery Protests in South Africa: Lessons for Municipalities By Musa Sebugwawo: Online at Available at:<http://www.afesis.org.za/Local-Governance-Articles/service-delivery-protests-in-south-africa-lessons-for-municipalities-by-musa-sebugwawo> Accessed on 24 March 13.

<sup>15</sup> South Africa’s current genie coefficient is at 0.578. Available at: <http://www.squarecirclez.com/blog/the-gini-coefficient-of-wealth-distribution/4187>: Accessed on 15 April 2012.



economic and social ills? I intend on pursuing this discussion in the following format:

Chapter one provides the reader with a historic overview of both the development of CSR and South Africa's historical governance system. This chapter will also briefly introduce the concept of a company and what it entails followed by a discussion of the factors that contributed to the need for a measure such as CSR.

Chapter two of the paper focuses on the views of academics that oppose the incorporation of CSR principles into business practices. The discussion will cover the various arguments against the implementation of CSR and consider the powers vested in directors and their responsibility towards the company.

Chapter three broadly discusses the various schools of thought that support the implementation of CSR. The discussion in chapter three covers the various benefits achieved through the implementation of CSR and the importance of implementing such a concept into the South African corporate arena.

Chapter four takes considers the legislative reform that has been achieved within the South African legislative sector and other positive steps that have been undertaken towards promoting the implementation of CSR. The chapter also looks at other jurisdictions and their adopted practices. In particular practices in the United States of America, United Kingdom, Germany and certain OECD countries will be examined.

Chapter five which is the concluding chapter sets out the concerns raised by the current mechanisms governing CSR and identifies recommendations that would assist in incorporating CSR into business strategies and practices.

## Chapter One

### 1. Corporate governance and the link to corporate social responsibility

*"Sound governance is not some abstract ideal or utopian pipedream. Nor does it occur as a result of accidents or sudden outbreaks of altruism... It happens only when leaders lead with integrity, when directors actually direct and when major organisations are held at the highest standards of accountability by vigilant stakeholders and informed individuals."*<sup>16</sup>

J Richard Finaly

#### 1.1 Corporate Governance

##### 1.1.1 Where it all began?

Recent monumental corporate crashes ie Maxwell Publishing Empire in the United Kingdom (UK), Enron and WorldCom in the US, Fidentia, Leisure Net, Reagal Bank, and Satyam in India have stimulated the debate around the need for good corporate governance structures and practices globally.<sup>17</sup>

"The growing distrust and scepticism towards company executives and directors globally has resulted in a panoply of new corporate governance requirements."<sup>18</sup> This resulted in several states overhauling their corporate governance systems in an attempt to prevent future corporate failures.<sup>19</sup>

Corporates have been severely criticised for the lack of consideration afforded to factors that are not directly linked to their balance sheets, financial portfolios or factors that do not guarantee larger profit margins. These corporate directors have also been strongly criticised for their boastful salaries and exorbitant severance payments.<sup>20</sup> This negative perception of the way corporates conduct their operations led to an exponential increase in the amount of laws, regulations, rules and guidelines establishing a heightened standard of corporate governance best practices and an enhanced focus on

<sup>16</sup> Finlay, JR. (2008) *When CEOs fail to lead*. Op cit fn 4 at I Available at <http://finlayongovernance.com/>: Accessed 15 May 12

<sup>17</sup> Op cit fn 4 at p2.

<sup>18</sup> Mc Convill, J.(2005) *Positive Corporate Governance and its implications for executive compensation*. German Law Journal. 6:12. p1777-1804.

<sup>19</sup> Op cit fn 4 at p2.

<sup>20</sup> Du Plessis, JJ. (2011) *The Principles of Contemporary Corporate Governance*. 2<sup>nd</sup> Edition. Cambridge University Press. p343.

the triple bottom line.<sup>21</sup> Increased focus is being placed on ethical economical conduct, trust, accountability and transparency.<sup>22</sup>

“At no time in history has the role and power of a company been accorded more popular attention and concern with the pure profit maximization axiom increasingly being called into question.”<sup>23</sup> As mentioned previously the increase in the number of corporate collapses has forced corporates into taking preventative measures. These preventative measures are enacted under the pretence that almost every aspect of modern day business operations has been affected to some extent by rapidly changing societal expectations of corporate behaviour.<sup>24</sup> Jamali argues that corporations have grown in size and influence hence they can no longer be expected to be mere financial contributors to the global economy. Rather, that they are encouraged to skilfully reconcile balancing the multiple bottom lines and managing the interest of stakeholders.<sup>25</sup> Hardjono and van Marrewijk purport that focus has shifted from that of ensuring that the short term goal of profit making is realised to that of long term social, environmental and economic sustainability.<sup>26</sup>

Corporate governance has been labelled an umbrella concept that encapsulates the various terms that are used to explain the practice where by corporates are encouraged to promote ethics, fairness, transparency and

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<sup>21</sup> The phrase “the triple bottom line” was first coined in 1994 by John Elkington, the founder of a British consultancy called Sustain Ability. He believes that companies should focus on the traditional measure of corporate profit i.e. the “bottom line” of the profit and loss account. The second is the bottom line of a company's “people account” ie a measure in some shape or form of how socially responsible an organisation has been throughout its operations. The third is the bottom line of the company's “planet” account ie a measure of how environmentally responsible it has been. Available at: <http://www.investopedia.com/terms/t/triple-bottom-line.asp>. Accessed 25 May 13.

<sup>22</sup> Marsiglia, E. and Falautano, I. (2005) *Corporate social responsibility and sustainability challenges for a Bancassurance Company*. The Geneva Papers. 30. p485-97. In Op cit fn 1 at p443.

<sup>23</sup> Op cit fn 4 at p241

<sup>24</sup> Franca, L. (2006) *A legal analysis of corporate social responsibility: A comparative approach*. (12) SAPR/PL.1. p286-298.

<sup>25</sup> Op cit fn 1 at p458

<sup>26</sup> Hardjono, T. W. and van Marrewijk, M. (2001) *The social dimensions of business excellence*. Corporate Environmental Strategy. (8). p223-233.

accountability in all their dealings.<sup>27</sup> In doing so corporates are expected to continue generating profits while maintaining the highest standards of governance. Corporate governance has been defined as “effective leadership characterised by ethical values of responsibility accountability, fairness and transparency.”<sup>28</sup> It is said to regulate the power within the company in order to ensure that the company’s purpose is achieved ie the practice by which the company is managed and controlled.<sup>29</sup> The concept as defined, if viewed in a narrow sense neglects to take into account society and the environment. It seems that corporate governance traditionally only took into consideration the financial aspects related to a business.<sup>30</sup> Voluntary codes regulating corporate governance eg: King Governance Code (I, II and III) that were introduced in South Africa, place significant emphasis on other stakeholders which signifies a firm move away from this narrow interpretation.

### 1.1.2 Legal Personality

A by-product of the Industrial Revolution was the emergence of several economic entities. These entities were owned and managed by the same persons. There was no differentiation between those that managed and took decisions on behalf of the company and those that reaped the benefits from the decisions taken.<sup>31</sup> With a noticeable change in the global trading arena corporates began to merge, expand in size, influence, power and control, and so too did the call for recognised, structured, regulated, forms of management principles. Companies are juristic persons. As juristic persons, they have the ability to acquire their own rights and are subject to their own duties apart and separate from those of its shareholders. This is confirmed in section 19 of the Companies Act 71 of 2008 (the Companies Act), which states

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<sup>27</sup> Freeman, R E and Reed, D L. (1983) *Stakeholder and stockholders a new perspective of Corporate Governance*. California Management Review. The Regents University of California. 25:3. p88 - 106.

<sup>28</sup> MacMillan, K, et al. (2004). Giving your organization spirit: An overview and call to action for directors on issues of corporate governance, corporate reputation and corporate responsibility. *Journal of General Management*. (30). p15–42.

<sup>29</sup> Op cit fn 4 at p3

<sup>30</sup> Monk, RG and Minow, N. (2004) *Corporate Governance*. 3ed. p13.

that, “a company from its date of incorporation has all the legal powers and capacity of an individual, except to the extent that a company as a juristic person is incapable of exercising such power or having such capacity.”<sup>32</sup>

These sentiments were firmly entrenched by the courts, as evident in the cases of *Solomon v Solomon Co Ltd*<sup>33</sup> and *Lee v. Lee's Air Farming Ltd*.<sup>34</sup> The respective courts had to pronounce themselves on whether or not the company as a corporate entity enjoyed a separate existence to that of its directors. In both these cases the courts firmly held that “once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself...”<sup>35</sup> These judgements clearly emphasised the fact that corporations enjoy a separate and distinct legal personality from its shareholders who in turn enjoy limited liability with respect to actions of the company. Juristic persons have no physical presence and are only capable of acting through human agents.<sup>36</sup> Unlike natural persons, a company does not have a conscience to guide its decisions nor do they have the ability to ponder over moral issues.

Milton Friedman<sup>37</sup> was one of the great champions of the shareholder primacy theory. He contended that the sole purpose of a corporation's existence is to maximise profits and that this was its only social responsibility. Directors therefore have a fiduciary duty to maximise profits hence any corporate resources used to assist charities and the like are in fact regarded by Friedman as having been stolen from the shareholders.<sup>38</sup>

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<sup>32</sup> Act No 71 of 2008.

<sup>33</sup> [1897] AC 22 (HL).

<sup>34</sup> [1961] A.C. 12 (New Zealand P.C.)

<sup>35</sup> Delport, P. (2011) *The new companies Act Manual including close corporations and partnerships*. 2ed. Lexis Nexis. p11.

<sup>36</sup> Other consequences of having a separate legal personality: The company's existence is separate to that of its shareholder, it has a perpetual existence, is subject to its own rights, is bound by the Bill of Rights, however a corporation can only act via its duly appointed agents. See fn 35 at p11 – 15.

<sup>37</sup> Milton Friedman was a well-known American economist and professor of statistics at the University of Chicago. Available at: [http://en.wikipedia.org/wiki/Milton\\_Friedman](http://en.wikipedia.org/wiki/Milton_Friedman): Accessed 13 May 13.

<sup>38</sup> Friedman, M. (1970) The Social Responsibility of Business is to Increase its Profits. The New York Times Magazine. p1-6.

Grossmann contends that social factors violate shareholder rights as it by unjustly seizing shareholder wealth; hence social factors should not be taken into account in a company's day-to-day business.<sup>39</sup> Directors are regarded as employees of shareholders and their fiduciary duty is to remain loyal to these shareholders, by maximising profits.<sup>40</sup>

In *Dodge v Ford Motor Co*<sup>41</sup> the courts have gone as far as saying that external factors such as social responsibilities must be considered *ultra vires* and illegal if they do not result in increased shareholder wealth. This approach calls on directors to exercise their fiduciary duties in the interests of shareholders only.<sup>42</sup> According to Berle companies pay taxes to ensure that social and environmental concerns are taken care of hence there is no additional duties on a company.<sup>43</sup> The merits of this argument will be discussed in detail in the third chapter of this paper.

Corporations, however they are managed, are expected to maintain the highest level of integrity and conduct themselves in a manner that is in tune with society's ethical, legal and communal aspirations. Compliance, accountability and transparency form the basic foundation of corporate governance, but it is not a foregone conclusion that these measures are adequate promoters of sustainability and growth.<sup>44</sup> Corporate governance seeks to ensure through a variety of oversight mechanisms, that management is encouraged to develop the business in the best interest of its shareholders.<sup>45</sup>

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<sup>39</sup> Grossman, HA. (2005) *Refining the role of the corporate social responsibility on shareholder primacy theory*. Deakin Law Review. p 572- 596.

<sup>40</sup> Solomon. RC. (1991) *Business Ethics*. in Singer. P. (1991). *A Companion to Ethics*. Oxford. Blackwell. p360.

<sup>41</sup> *Dodge v Ford Motor Co* 204 Michigan. 495. 668 (1919).

<sup>42</sup> Berle, A. (1931) *Corporate powers as powers in trust*. Harvard Law Review. (44). p1047.

<sup>43</sup> Ibid fn 42 at p1047

<sup>44</sup> Op cit fn 1 at p445

<sup>45</sup> Mullerat, R et al. (2005) *Corporate social responsibility: the corporate governance of 21<sup>st</sup> century*. Kluwer Law International. The Netherlands. p38.

### 1.1.3 What is corporate social responsibility?

Hendy Ford II was bold enough to utter what many other business heads were thinking in as early as 1969.

*"The terms of contract between industry and society are changing....Now we are being asked to serve a wider range of human values and to accept an obligation to members of the public with whom we have no commercial transactions."*<sup>46</sup>

Henry Ford II

Years later Hall argued that corporates needed to redefine the rules of the economic game in order to move from a situation of wasteful consumption and pollution to one of conservation and from one of privilege and protection to one of fair and equitable changes open to all.<sup>47</sup> This goes against the traditional norms of conducting business where the primary concern of a business was to make a profit.

The existence and sustainability of corporations are highly dependent on society and their surrounding communities at large. Hence the concept of corporate governance can't be the only management principle that should be applied to the day to day running of corporations. It is essential that a link be sourced between the external community, the environment and the internal economic purpose of a corporation's existence. The concept that best includes all three areas of concern is CSR. CSR is not simply about corporates spending funds and expertise, it goes beyond these things. It deals with the companies' integrity as an institution, its mission, values and most importantly the impact it has on the community. This concept has been around since the early 1950's and has managed to gain prominence through the course of history. During the 1950's CSR took on a more philosophical approach.<sup>48</sup> The concept gained further momentum in the 1960's as

<sup>46</sup> Sentiments echoed by Hendry Ford the second in 1969. A decade during which the primary purpose of a company was to make a profit.

<sup>47</sup> Hall, DT. (1996) *The career is dead, Long Live the career a rational approach to career*. San Francisco: J Jossey-Bass Publishers. p150.

<sup>48</sup> Bowman. E.H. & Haire. M.A. (1975) *A strategic posture towards corporate social responsibility*. California Management Review. 18:2.p 49-58.

“heightened realizations of repressive labour practices led to further calls for ethical business practices.”<sup>49</sup>

Frederick,<sup>50</sup> a well-known proponent of CSR during the 1970’s and 1980’s, took a more philosophical stance and viewed CSR as an obligation to work for social betterment.<sup>51</sup> From the late 1980’s through to the early 1990’s CSR was viewed as a means to the return of an ethical or moral basis of informing managerial action.<sup>52</sup> Today the focus is on the lengths that directors must go to for their actions to be considered socially responsible and the consequences when they do not go to these lengths.<sup>53</sup> The issue currently, is to focus on the ‘how’ and no longer the ‘why’.<sup>54</sup> These issues have become a determinant factor in the success of corporations.<sup>55</sup>

There isn’t a universal definition, nor are there any clearly demarcated boundaries, for the application of CSR. Several authors have attempted to define CSR since its conception.<sup>56</sup> The World Business Council for Sustainable Development (WBCSD) defines CSR as the commitment of business to contribute to sustainable economic development, working with employees, their families and local communities.<sup>57</sup> The European Commission regards the voluntary contribution by corporations that is used

<sup>49</sup> Lantos, G. (2001) *The Boundaries of Strategic corporate social responsibility*. Journal of Consumer Marketing. 8:7. p595 – 630.

<sup>50</sup> Frederick, W.C. (1994) *From CSR1 to CSR2: The maturing of business and society thought*. Business and Society. 33:2. p150-167.

<sup>51</sup> Da Piedade, L and Thomas, A. (2006) *The case for corporate social responsibility: Arguments from literature*. SA Journal of Human Resource Management. 4:2. p57-64.

<sup>52</sup> Moir, L. (2001) *What do we mean by corporate social responsibility?* Corporate Governance. Emerald Group Publishing Limited. 1:2. p16-22.

<sup>53</sup> See Horrigan, H. (2008) *Corporate social responsibility in the 21<sup>st</sup> century debates, models and practices across governments*, Law and Business. Available at: <http://www.austlii.edu.au/au/journals/MqJBLaw/2007/5.html>. Accessed 16 March 2013.

<sup>54</sup> Esser, IM. (2011) *Corporate Social Responsibility: A company law perspective*. South African Mercantile Law Journal. (23). p317-335.

<sup>55</sup> Lou, L & Venter, P. (2010) *Strategic Management Developing Sustainability in South Africa*. Oxford University Press South Africa (Pty) Ltd. p49.

<sup>56</sup> Op cit fn 51 at p58. Also see Business for Social Responsibility (2002). Overview of corporate social responsibility. Available at: <http://www.bsr.org/BSRResources/IssueBriefDetail.cfm?DocumentID=48809>: Accessed 20 March 13.

<sup>57</sup> Windsor, D. and Preston. (2001) *The Business Case for Sustainable Development: Making a Difference toward the Johannesburg Summit 2002 and Beyond*. WBCSD. Switzerland.



for the betterment of society and the environment as CSR.<sup>58</sup> Last but not least efforts made by corporations which are in addition to what is required by law are regarded by Hinkley as a positive move towards enforcing CSR.”<sup>59</sup>

These definitions cover a wide range of conceptualizations ranging from mere corporate philanthropy, philanthropy that encompasses more long term goals that focuses on sustainable development, stakeholder theory, shareholder primacy theory, business ethics and the relationship between business and society in general.<sup>60</sup> The stakeholder and shareholder primacy theories will be discussed at a later stage in this paper.

The most common of these conceptualizations is that of Archie Carroll and Geoffrey Lantos.<sup>61</sup> Carroll defines CSR as having a hierarchy of four responsibility levels ie economic, legal, ethical and philanthropic components. On the other hand Lantos defines CSR as having three responsibility types i.e. ethical, altruistic and strategic.<sup>62</sup> “Lantos’ defined ethical responsibility embodies Carroll’s economic, legal and ethical responsibilities.”<sup>63</sup> He also replaces “Carroll’s term of philanthropic responsibility with altruistic responsibility and adds strategic social responsibility to his classification.”<sup>64</sup> According to Carroll, the most important conditions for socially responsible corporations are to meet the

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<sup>58</sup> European Commission. (2001) Promoting a European Framework for Corporate Social Responsibility. Green Paper. Luxembourg: Office for Official Publications of the European Communities.

<sup>59</sup> See Hinkley, R. (2007) *Do No Harm: A Corporate Hippocratic Oath*. The Australian Financial Review. p63.

<sup>60</sup> Op cit fn 51 at p58

<sup>61</sup> Carroll, AB. (2000) *The four faces of corporate citizenship*. in Richardson JE. (Ed) Business Ethics . Duskin/McGraw-Hill. Guilford. CT. pp187-191 and Carroll, AB. (2001) *Ethical challenges for business in the new millennium: corporate social responsibility and models of management morality*. In Richardson JE. Business Ethics, Duskin/McGraw-Hill, Guilford. CT. p 198-203.

<sup>62</sup> Carroll, A. B. (1991) *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*. Business Horizons. p39-48.

<sup>63</sup> Virvilaite, R and Daubaraite. (2011) *Corporate Social Responsibility in Forming Corporate Image*. Engineering Economics. 22:5.p534-543.

<sup>64</sup> Op cit fn 63 at p535

economic and legal expectations because they provide the basis for further ethical and philanthropic responsibilities, to which Lantos agrees.<sup>65</sup>

Carroll believes that CSR involves contributing to the good of various societal stakeholders even if it means that corporates have to sacrifice a portion of their profits.<sup>66</sup> Lantos, however differs from Carroll on this point. He argues that rather than carrying out philanthropic gestures corporates should implement strategic social responsibility, by doing so they will gain positive publicity, a marketable reputation and benefit society.<sup>67</sup>

In addition to the dilemma of defining the concept, the term itself in its entirety has evolved to take on several different personas. The concept of CSR is used interchangeably with the terms such as corporate social citizenship (CSC), corporate social investment (CSI) and corporate citizenship (CC). "CC is defined as a business having comprehensive policies and practices in place throughout the business that enable it to make decisions and conduct its operations ethically, meet legal requirements and show consideration for society, communities and the environment."<sup>68</sup> Zadec goes to the extent of describing corporate citizenship as a business taking greater account of its social, environmental and financial footprints.<sup>69</sup> The term corporate social investment is said to describe instances when businesses undertake projects that are external to their normal course of business, for the purposes of uplifting communities.<sup>70</sup> All of the above mentioned definitions broadly speak about common goals i.e the betterment of society, transparency and accountability.

In applying the concept directors should manage the company in such a way that the company "voluntarily expends its resources to do something not

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<sup>65</sup> Op cit fn 63 at p536

<sup>66</sup> Lantos, G. (2002) *The Ethicality of altruistic corporate social responsibility*. Journal of Consumer Marketing. 19:3.p 205- 230.

<sup>67</sup> Op cit fn 63 at p535

<sup>68</sup> Trialogue. (2004) *The good corporate citizen: pursuing sustainable business in South Africa* Cape Town: Trialogue. p8.

<sup>69</sup> Zadec. S. (2001) *The Civil Corporation: The New Economy of Corporate Citizenship*. 1<sup>st</sup> Ed. London: Earthscan Publications. p7.

<sup>70</sup> Op cit fn 11 at p601

required by law and without immediate economic benefits.”<sup>71</sup> These definitions attempt to link business to wider societal concerns<sup>72</sup> and to sensitise them to the impact that business has on internal and external stakeholders.<sup>73</sup>

Applying business thinking and a long-term planning approach to CSR initiatives is highly dependent on fully understanding the expectations of both shareholders and other beneficiaries as well as developing a clear appreciation of the specific needs of the community in which the CSR project will be rolled out. It is all too easy for companies to take a short-sighted view and rubber stamp solutions onto communities.<sup>74</sup> The aim behind the implementation of such a concept is to ensure that companies integrate social and environmental strategies into their core business so that the existence of the company will be sustainable in more than just financial terms.<sup>75</sup> Companies compliant with the concept are said to act in a socially responsible manner and decisions taken are focussed on ethical values, legal compliance and respect for society and the environment.

It is almost impossible to pick up a book or an article about CSR and not read about the importance of stakeholders. Stakeholders are any person/s or group/s who can affect or be affected by the achievement of the organisation’s objectives.<sup>76</sup> Stakeholders in particular customers, employees and clients pose a great challenge to corporates. The challenge lies in satisfying all their unique concerns and complying with all regulatory requirements pertaining to each group. Robert Solomon and other commentators argue that corporations owe their duty to stakeholders, in

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<sup>71</sup> Hodes, L. (1983) *The social responsibility of a company*. South Africa Law Journal. (100). p468-495.

<sup>72</sup> Op cit fn 54 at p319

<sup>73</sup> The Growing Importance of CSR (Corporate Social Responsibility), Available at: <http://a-k.hubpages.com/hub/The-Growing-Importance-of-Corporate-Social-Responsibility>, Accessed on 09 March 2011.

<sup>74</sup> Op cit fn 2 at p11

<sup>75</sup> Op cit fn 4 at p253-254

<sup>76</sup> Cooper, S. (2004) *Corporate Social Performance: A Stakeholder Approach*. Ashgate Publishing Cia. London-Hants. UK.p21-22. citing other authors particularly Freeman.

particular the surrounding community, employees and the consumers using their products and services.<sup>77</sup>

Corporate entities have come to understand that strong corporate social responsibility programmes are essential elements in achieving good business practices and effective leadership. CSR requires that additional emphasis be placed on norms, standards and expectations which reflect concerns for fairness, justness, and morality by company's stakeholders such as consumers, employees, shareholders and the community where it operates.<sup>78</sup> Although there are several terms and nuances in the various definitions of CSR for the purposes of this paper the voluntary expending of capital and resources by a corporation to do something not required by law without immediate economic benefits will be referred to as CSR.<sup>79</sup>

## 1.2 Catalyst to the formula

There have been many contributing factors that have fuelled the debate on the need for an enhanced global corporate governance system. Government's failure to provide for the basic needs of its citizens, globalisation, corporate failures, increase in consumer awareness, outcry for the protection of human rights and the environment are yet but a few of these reasons.<sup>80</sup> The remainder of this chapter will cover a discussion on the various contributory factors towards the development of revised management principles that integrate social, environmental and economic factors.

<sup>77</sup> Op cit fn 20 at p352

<sup>78</sup> Iwu-Egwuonwu, R. (2010) *Does corporate social responsibility (CSR) impact on firm performance? A literature evidence* Available at : <http://www.csrngreece.gr/files/research/CSR-1289998020.pdf?user=fd89c0d28a0bfe418704b52dfd21de73>, Accessed 13 April 12.

<sup>79</sup> Op cit fn 71 at p468

<sup>80</sup> Smith, N.C. (2001) *The role of consumer boycotts and socially responsible consumption in promoting CSR*, in Bloom, P N and Gundlach, G.T. *Handbook on marketing society*, Sage Publications. Thousand Oaks.C. p140-161. Also See Sebugwawo, M. *Service delivery protests in South Africa lessons for municipalities* Available at: <http://www.afesis.org.za/Local-Governance-Articles/service-delivery-protests-in-south-africa-lessons-for-municipalities-by-musa-sebugwawo>. Accessed and de Visser, J and Steytler, N. (2012) *Service Delivery Protest Barometer*. Local Government Bulletin. 14:3 Available at: [http://www.mlgi.org.za/publications/publications-by-Accessed theme/local-government-bulletin/2012-local-government-bulletin-october-volume-14-issue-3/LGB%20vol%2014\(3\)%20October%202012.pdf](http://www.mlgi.org.za/publications/publications-by-Accessed%20theme/local-government-bulletin/2012-local-government-bulletin-october-volume-14-issue-3/LGB%20vol%2014(3)%20October%202012.pdf) Accessed 24 March 13.

### 1.2.1 Governments' failure to provide

The majority of South Africans have had a long relationship with inequality and poverty. The second Carnegie Conference held in 1983 examined poverty levels amongst the South African black population and highlighted the appalling poverty that prevailed amongst the rural townships.<sup>81</sup> According to May, South Africa is described in per capita terms as an upper-middle income country.<sup>82</sup> However the distribution of wealth within South Africa is still amongst the most unequal in the world.<sup>83</sup> Most households still have unsatisfactory access to clean water, energy, health care and education. Although poverty isn't confined to any one race group it is more prevalent amongst the black population. The apartheid system advantaged the minority race to the detriment of the majority. Apartheid and years of oppression has contributed to the country ranking as one of the most unequal societies in the world. The country has experienced some economic growth but in the terms of service delivery there has been little progress.<sup>84</sup>

This becomes evident when considering the increase in the number of service delivery protests.<sup>85</sup> These protests are caused by governments' failure to provide quality basic education, health care, running water, electricity, housing and jobs.<sup>86</sup> The University of the Western Cape's Service Delivery Protest Barometer recorded a total of 720 protests from the beginning of 2009

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<sup>81</sup> May, J. (2009) Poverty and inequality in South Africa. Presentation. Centre for Social and Development Studies. University of Natal. p3.

<sup>82</sup> Ibid fn 81 at p3

<sup>83</sup> Op cit fn 81 at p3

<sup>84</sup> OECD. (2013) *OECD Economic Surveys: South Africa 2013*. OECD Publishing Available at: <http://www.treasury.gov.za/publications/other/OECD%20Economic%20Surveys%20South%20Africa%202013.pdf>: Accessed 3 April 2013.

<sup>85</sup> The Harrismith protests took place after community leaders gave the municipality ten days to respond to their grievances but to no avail. Again in Frankfort ( Mafube Municipality), violence broke out in August 2005 because the council did not respond to a petition. In Excelsion in Mantsopa Municipality, a group of angry residents threatened to take their municipality by storm if the municipal manager continued to ignore their grievances. In Welkom, a group of protestors claimed that their petitions had been ignored for two years. These and other factors are the catalyst to community frustrations which consequently boil over onto the streets. Available at: <http://www.afesis.org.za/Local-Governance-Articles/service-delivery-protests-in-south-africa-lessons-for-municipalities-by-musa-sebugwawo> Accessed on 24 March 13.

<sup>86</sup> Op cit fn 81 at p4

to end August 2012.<sup>87</sup> The lack of service delivery has been characterised by mass protest action and petitions.

Atkinson relates the mass protest actions as being indicative of frustrations that have been building up over a long period of time.<sup>88</sup> These costly and difficult responses of communities resorting to protests have become a characteristic feature of ordinary people's response when municipal governments fail to take action regarding community challenges.<sup>89</sup> Kimemia<sup>90</sup> compares the manner in which service delivery is dealt with at local government level to the ridiculous utterance of Marie Antoinette, who is famously alleged to have "...joked to the poor French masses that if it is hard to find bread people should resort to cakes."<sup>91</sup> Despite the outbreak of protests there has been little progress to ensure that calls for service delivery are met.

### 1.2.2 Globalisation

Globalisation is regarded as a process of extending social relations across world-spaces.<sup>92</sup> This phenomenon occurs when there is a movement of large volumes of people, things and ideas. It cannot be defined in terms of internationalization or integration as some theorists have suggested, though these developments might be an outcome of globalization.<sup>93</sup> Though it may simply mean global interconnectedness, it includes a number of interlinked

<sup>87</sup> University of the Western Capes Service Delivery Protest Barometer Available at: [http://www.mlg.org.za/publications/publications-by-theme/local-government-bulletin/2012-local-government-bulletin-october-volume-14-issue-LGB%20vol%2014\(3\)%20October%202012.pdf](http://www.mlg.org.za/publications/publications-by-theme/local-government-bulletin/2012-local-government-bulletin-october-volume-14-issue-LGB%20vol%2014(3)%20October%202012.pdf) Accessed on 23 May 13.

<sup>88</sup> Atkinson, D. (2007) *Taking to the Streets: Has Developmental Local Government failed in South Africa*, in Buhlungu, Sakhela, Daniel Johnson, Southall Roger and Lutchman Jessica (eds), *State of the Nation South Africa*. Cape Town.p54.

<sup>89</sup> <http://www.afesis.org.za/Local-Governance-Articles/service-delivery-protests-in-south-africa-lessons-for-municipalities-by-musa-sebugwawo> Accessed on 24 March 13.

<sup>90</sup> Peter, K. (2011) *Community dissatisfaction: a direct result of non-responsiveness by government*. Available at: <http://www.afesis.org.za/Local-Governance-Articles/community-dissatisfaction-a-direct-result-of-non-responsiveness-by-government-by-peter-kimemia>. Accessed on 24 March 13.

<sup>91</sup> Op cit fn 85 at p2

<sup>92</sup> Available at: <http://en.wikipedia.org/wiki/Globalisation>. Accessed on 23 March 2013

<sup>93</sup> Available at: <http://www.slideshare.net/ErikaRawrr/globalisation-essay>. Accessed on 23 March 2013.

and complex economic, technological, cultural, environmental and political processes.<sup>94</sup> This interconnectedness has led to a wide scale availability of technology made up of social media networks. Information is no longer hostage to jurisdictional time and space. With a mere click of a button information can be distributed as well as sourced.

Globalisation also led to the expansion of the global trading arena. Corporates have grown bigger, more influential and on the contrary governments whose traditional responsibility was to improve the lives of their citizens have grown weaker in their ability to provide for their citizens. Increased societal pressure, a call for accountability, sustainability, responsibility and transparency meant that businesses were being challenged on the grounds that some of their activities were making society ugly, dirty, polluted, dangerous, and that business was acting as a powerful institution for perpetuating economic and social inequalities.<sup>95</sup>

### **1.2.3 Awareness, Failures and Rights**

#### **1.2.3.1 Consumer Awareness**

In the early 1990's Shell executives realised that social and environmental issues could no longer be ignored. Public opinion turned against the company and consumers started boycotting Shell service stations. This unfortunately was not the end of the wrath left behind by the lack of acceptable business practices that the conglomerate had engaged in. Shell experienced serious difficulty in recruiting highly skilled individuals who were reluctant to work for a company with a tarnished reputation. Similar effects were experienced in the more recent years by the Anglo Gold Ashanti Mines,<sup>96</sup> Nike<sup>97</sup> and Daimler Chrysler.<sup>98</sup>

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<sup>94</sup> Available at: <http://www.preservearticles.com/201104215747/short-essay-on-globalisation.html> Accessed on 23 March 2013.

<sup>95</sup> Melvin, A. (1980) *Corporate strategies for social performance*. Macmillan publishing Co, Inc 866 Third Avenue. New York. p24.

<sup>96</sup> Op cit fn 52 at p49

Deakin purports that company law systems around the world have been reformed in a way that reflects a widely held consensus concerning the relationship between corporate governance, finance and growth.<sup>99</sup> This is evident in the transformation of corporate regulatory regimes globally. “In excess of 20 codes of corporate governance have been developed in various jurisdictions, including but not limited to Singapore, China, Australia, Germany, Hungary, Indonesia and South Africa.”<sup>100</sup>

In the United Kingdom, the 2006 Companies Act requires companies to consider the impact of their operations on the community and the environment.<sup>101</sup> The German Commercial Code requires management reports to demonstrate that the company’s decisions have taken CSR into account.<sup>102</sup> In Sweden, Denmark and Norway, reporting in terms of the Global Reporting Initiative (GRI) guidelines is mandatory for certain companies<sup>103</sup> and in South Africa the Johannesburg Stock Exchange (JSE) launched the JSE Socially Investment Responsible Index in 2004. These initiatives identify companies that incorporate sustainability practices into their business activities. The success of listed companies has resulted in peer pressure for those companies that were not listed to match the same standards, thereby creating a benchmark to which companies can aspire.<sup>104</sup>

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<sup>97</sup> See Op cit fn 4 at p249 and Also available at: <http://www.brandingstrategyinsider.com/2008/07/social-responsibility.html#UdQXHjtTCFg>. Accessed 23 March 13.

<sup>98</sup> Op cit fn 4 at p242

<sup>99</sup> Deakin, S. (2010) *Corporate Governance finance and growth unravelling the relationship*. in Mongalo, T. (2010) *Modern Company Law for a comparative South African Economy*. Juta and Co Ltd. p191.

<sup>100</sup> Op cit fn 4 at p4

<sup>101</sup> Section 172 of the UK Companies Act 2006 Available at: [http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga\\_20060046\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf). Accessed 13 April 2013.

<sup>102</sup> Op cit at fn 4 at p246 Also see Carrots and sticks promoting transparency and sustainability. Available at: <https://www.globalreporting.org/resource/library/Carrots-And-Sticks-Promoting-Transparency-And-Sustainability.pdf>. Accessed 23 March 2013

<sup>103</sup> Op cit at fn 4 at p246.

<sup>104</sup> Op cit fn 4 at p244



### 1.2.3.2 Corporate Failures

In 1996, sports brand Nike was publicly accused of using child labour in its offshore factories. Criticism endured until 1998 when the company announced long-term measures to improve conditions.<sup>105</sup> Technology company Apple faced renewed criticism in 2011 for a lack of transparency in its supply chain and for alleged environmental indiscretions, the company admitted in 2008 that half of its suppliers of iPhones and iPads did not pay overtime and one quarter were paying workers just minimum wage. Both companies are still battling perceptions with respect to human rights and ethical business practices.<sup>106</sup> The increased focus on the symbiotic relationship between companies and the societies in which they operate has assisted in shaping international thinking and fuelled the growth of sustainability issues in recent years.

### 1.2.3.3 Human and Environmental Rights

Companies are more powerful today than ever before, however there is also a continuously growing gap between the world's affluent persons and the indigent individuals. Currently half the world's population lives on less than two dollars a day.<sup>107</sup> There is an increasing realization that the global economy will not be sustainable if billions of people have no stake in it.<sup>108</sup> Our natural resources are being used up far quicker than they are being replenished placing the available resources under unbearable pressure.<sup>109</sup>

Human rights are an increasingly important aspect of corporate social responsibility. The United Nations (UN) Guiding Principles on Business and Human Rights define what companies and governments should do to avoid

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<sup>105</sup> Managing Sustainability Global Supply Chains: Framework and best Practices. NBS Knowledge Centre. Available at: <http://nbs.net/wp-content/uploads/NBS-Executive-Report-Supply-Chains.pdf>. Accessed 26 March 13.

<sup>106</sup> Available at: <http://www.independent.co.uk/news/world/asia/apple-admits-it-has-a-human-rights-problem-6898617.html> Accessed on 2 March 2013.

<sup>107</sup> Available at: <http://www.globalissues.org/article/26/poverty-facts-and-stats>. Accessed 5 March 13.

<sup>108</sup> Op cit fn 4 at p249 – p250

<sup>109</sup> Rickli, J. (2011) *Increasing Environmental sustainability awareness through second life*. Michigan Technological University. p1 -10.

and address possible negative human rights impacts by business. The European Union (EU) encourages and contributes to implementation of the UN Guiding Principles. Many EU Member States are developing national plans on business and human rights.<sup>110</sup>

### 1.3 The situation in South African

The reality of the current situation in South Africa is that society's expectation of business covers a lot more than profit maximization. The arrival of the new democracy has done little or nothing to alleviate poverty in South Africa. David Fig<sup>111</sup> has argued that, "big business has failed to take responsibility for its past actions and has further failed to voluntarily take any significant steps to a 'more equitable post-apartheid transformation.'"<sup>112</sup>

HIV/AIDS has left corporates with no option but to deal with the situations using the hands on method. Such a response has been informed by "enlightened self-interest or even business survival".<sup>113</sup> The effects of this pandemic on the workforce and its negative impact on a corporation's daily business will be discussed in chapter three.

The current economic situation in South Africa is a desperate call for a change in the mind-set of the way corporations are run. However does an ailing economy mean that corporates should adopt long term goals that focus on social, environmental and economic needs? The next chapter sheds some light on the schools of thought that exclude the adoption of CSR principles into the day to day running of a business.

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<sup>110</sup> Available at: [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm) Accessed 23 March 2013.

<sup>111</sup> Op cit fn11 at p4

<sup>112</sup> Hamman, R et al. (2005) *Universalizing Corporate Social Responsibility? South African Challenges to the International Organization for Standardization's New Social Responsibility Standard*. Business and Society Review. 110:1.p1-19.

<sup>113</sup> Ibid fn 112 at p5

## Chapter Two

### 2. Arguments against CSR

The fact that the amount of wealth and power corporations control obligates them to a certain standard of behaviour is not a new concept.<sup>114</sup> Charles Dickens explicitly wrote about the exploitation of workers in England in several of his novels.<sup>115</sup> When thinking of Charles Dickens the infamous character of Ebenezer Scrooge comes to mind and his continuous ranting about his precious money.

*"I want to be left alone," said Scrooge. Since you ask me what I wish gentleman, that is my answer. I don't make merry myself at Christmas and I can't afford to make idle people merry....."*<sup>116</sup>

Scrooge, a wealthy businessman was demonised as a miser who ruined Christmas. His attitude seems laughable at first glance, and yet one can only imagine how many shareholders utter these exact sentiments on a daily basis. As mentioned previously a company is defined as a juristic person,<sup>117</sup> that has the ability to acquire their own rights and are subject to their own duties apart and separately from their shareholders. However as juristic persons they are not capable of experiencing human emotions nor can they act on them.<sup>118</sup>

Society's expectations of business ethics has changed considerably.<sup>119</sup> Unlike before, productivity alone is no longer sufficient moral grounds to justify a business.<sup>120</sup> Religious principles such as charity and stewardship began influencing business practices. This gave rise to the social contract. This tacit sense of responsibility gained momentum during the latter half of the 20<sup>th</sup>

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<sup>114</sup> Walden, M. (2007) *Business and Economics, Battle ground Business*. Greenwood Publishing Group. p60.

<sup>115</sup> Ibid fn 114 at p61

<sup>116</sup> Dickens, C. (2001) *A Christmas Carol*. In *Christmas Carol and Other Stories*. New York: Modern Library. p1843.

<sup>117</sup> Section 19 of the Companies Act

<sup>118</sup> Cassim et al. (2012) *Contemporary Company Law*. Juta and Co Ltd. 2ed. p31

<sup>119</sup> Op cit fn 51 at p598.

<sup>120</sup> Op cit fn 51 at p598.

century.<sup>121</sup> This contract concerns a corporation's indirect societal obligation to citizens and government. The charity and stewardship principle requires that the more fortunate individuals in society assist the less fortunate and the basis for this stewardship principle is a biblical doctrine that also requires business and wealthy individuals to see themselves as stewards.<sup>122</sup>

Charitable gestures are usually based on one's personal discretion and are motivated by some kind of moral or religious affiliation. Corporations do not subscribe to such moral or religious codes hence they are not bound to carry out philanthropic gestures. According to Friedman "only people have responsibilities corporations are artificial persons and in this sense they may have artificial responsibilities..."<sup>123</sup> Friedman like several other authors criticise the legitimacy of CSR.<sup>124</sup> They argue that the primary responsibility of a corporation is to maximise profits and in doing so they need to abide by the law. Like Friedman, Moir argues that the only responsibility that a company has is to provide jobs and pay their due taxes.<sup>125</sup>

As human beings one may choose to devote ones time, effort and resources towards assisting charities, churches, clubs or society at large. In this regard an individual acts as the principal by having control over the disbursement of his/her salary and not acting as an agent and dispersing his principal's funds. A company pays taxes and the government is tasked with the imposition and expending of these taxes. These taxes should be used to take care of all of society's social responsibilities. According to Friedman, in a

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<sup>121</sup> Op cit fn 49 at p598

<sup>122</sup> Op cit fn 49 at p598

<sup>123</sup> Op cit fn 38 at p137-141.

<sup>124</sup> Similar sentiments are echoed by several other authors, i.e Korten who argues that ethical organisations are pushed out of a competitive market, Albert Carrs, view that business has lower standards of ethics than society and no social responsibility either than obedience to the law and Zadek who firmly believe that being good doesn't always pay. Levitt argues that "Its business is making money not sweet music." Also see Grayson, D and Hodges A. (2001). *Everybody's business*. Listed London: Darling Lindlersley Ltd and Zadek, S. (2004) *The path to corporate social responsibility*. Harvard Business Review. December. p1-8.

<sup>125</sup> Op cit fn 54 at p18

democratic society government is the only legitimate vehicle for addressing social concerns.<sup>126</sup>

Adam Smith's theory of the invisible hand underwrites the capitalist approach. He argues that pursuing one's self interest would result in the overall good of society.<sup>127</sup> Smith's theory followed the principle that the pursuit of individual interests will motivate employees to perform better, facilitate competition and personal hard work, and as a result the economy will benefit from additional jobs and an increase in competition will result in better quality goods.<sup>128</sup> Healthy competition in the market place could encourage and promote personal development.<sup>129</sup> This theory further encourages a line of thought that supports the best economic system of promoting and encouraging wealth, efficiency by creating jobs and investment opportunities that have benefits for all.<sup>130</sup>

Critics within the corporate world strictly maintain that ethics do not have any place in business and that corporations should solely be about maximising profits for the relevant stakeholders. The shareholder's property rights should also not be forfeited on behalf of the needs of the community, no matter how urgent. It is proposed that often the stockholder's legitimate property rights are being "sacrificed on the altar of questionable societal welfare rights,"<sup>131</sup> all in the name of altruistic CSR. Shareholders invest in a corporation with a legitimate expectation of receiving returns on their investment. Hence if CSR is to be carried out there should be a direct link between the amount spent and the increase in company profits.<sup>132</sup> Corporations can be regarded as carrying out "self-contained activities, where the rules of the game are already set out, thus there seems to be little

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<sup>126</sup> Carroll, AB & Bucholtz, AK. (2000) *Business and society*. 4ed. Cincinnati. South Western College Publishing. p15.

<sup>127</sup> Op cit fn 49 at p611

<sup>128</sup> Available at: <http://www.triplepundit.com/2012/08/adam-smith-milton-friedman-social-responsibility-of-business>. Accessed on 24 March 13.

<sup>129</sup> Op cit fn 49 at p596

<sup>130</sup> Op cit fn 49 at p611-612

<sup>131</sup> Op cit fn 65 at p218

<sup>132</sup> Op cit fn 65 at p222

to no room for moral evaluation of the activities conducted within the scope of business.”<sup>133</sup> These corporate activities are regulated by a set of complex and extensive legal rules and thus such activity should be immune from moral evaluation.

## 2.1 Lack of definition

As previously mentioned the concept of CSR does not have a universally accepted definition. The term CSR is often used interchangeably with concepts such as corporate governance, corporate citizenship or corporate sustainability. In the past 30 years the situation hasn't changed; there still isn't a universally identified definition for the concept of CSR. One might however also argue that the absence of a clear definition, its inherent flexibility and its inexactness has contributed to its charm. This allows corporations to apply the concept broadly in order to promote their ideals to benefit their business. The various attempted definitions include virtues such as ethical behaviour, philanthropy, a sense of higher fiduciary duty and the responsibility to do the right thing.<sup>134</sup> Aside from this, CSR covers a vast range of interests including shareholder interests, sustainability, environmental issues, ethicality, and labour to name a few.<sup>135</sup>

These definitions and interests do not provide a benchmark to test whether or not CSR was adopted and implemented accordingly. The voluntary character of CSR implies that corporations should perform above regulatory requirements, which results in setting the minimum performance level as deemed acceptable.

## 2.2 Shareholders v stakeholders

Freidman clearly argues for the promotion of shareholder supremacy. He bases his arguments on the fact that shareholders have invested funds into the corporation hence they are the rightful owners of the corporation.

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<sup>133</sup> Op cit fn 20 at p348

<sup>134</sup> Op cit fn 65 at p66

<sup>135</sup> Op cit fn 45 at p97

“Shareholders have legitimate claims to have the company managed in their own best interest. Secondly as owners they bare the risks should the corporation not be profitable. Thirdly shareholders do not have the luxury of being protected by way of a legally binding contract unlike their employees and creditors.”<sup>136</sup>

The fact that CSR covers a wide range of stakeholders makes it impossible for companies to satisfy all of them. The lack of definition and its voluntary application creates loopholes for corporations to interpret and implement CSR as they please. If and when, corporations do implement CSR it is usually for free publicity or some kind of indirect benefit towards the well-being of their business. The Stakeholders’ Inclusive Approach is a direct contrast to the Shareholder Primacy Approach.<sup>137</sup> The Stakeholder Inclusive Approach manages to satisfy both the interest of the stakeholder and shareholders to some extent. This approach encourages corporations to consider the economic, social and environmental factors in managing the company.<sup>138</sup> The Stakeholder Inclusive Approach is highly promoted in King Code of Governance III (King III).<sup>139</sup>

“Stakeholders are defined as any group or individual who can affect or is affected by the achievement of the organisations objectives.”<sup>140</sup> The provision of goods and services by corporation’s spans far and wide, often transgressing national and international boundaries. The question one should ask is, should corporations be expected to take heed of the concerns of each and every stakeholder? Surely this goes beyond the scope of the

<sup>136</sup> Esser, I. (2005) *The enlightened shareholder value approach versus plurism in the management of companies*. p719 -725. LLM Thesis. University of Aberdeen. Scotland: Although limited protection for shareholders is available in the articles of incorporation.

<sup>137</sup> The Stakeholders Theory: According to this theory the responsibility of a corporation encompasses more than its primary economic duty to shareholders. See fn49 at p59. The Enlightened Shareholder Value Approach: this theory contends that the primary responsibility of a company is to maximise profits for its shareholders and must take into consideration the need to foster a productive relationship with stakeholders. See fn 49 at p59.

<sup>138</sup> Op cit fn 118 at p495.

<sup>139</sup> Op cit fn 118 at p 495

<sup>140</sup> Freeman, ER. (1984) *Strategic management: A stakeholder approach*. Boston: Pitman Publishing.p46.

corporate mandate? Clarkson<sup>141</sup> and Dowling<sup>142</sup> advise that in terms of determining who exactly can be qualified as a stakeholder a clear determination needs to be made between primary and secondary stakeholders. For the purpose of this paper I will focus on the primary stakeholders with an occasional mention of other stakeholders. Primary stakeholders are generally understood to be shareholders, investors, employees, customers, the government and suppliers.

The primacy of individual rights over group rights also supports the viewpoint that social responsibilities are owed primarily to workers and customers, rather than to world-wide concerns. The highest level of interdependence exists between primary stakeholders and the organisation since damage to this relationship affects the survival of the organisation.<sup>143</sup> Naidoo cites the case of Shell and Nike as examples of companies who, as a result of highly publicized human rights abuses, suffered a severe loss of reputation, which they consequently spent billions of dollars attempting to restore.<sup>144</sup> A bad reputation can have negative financial consequences for the company in question.<sup>145</sup>

The theory falls short in that it fails to specify how trade-offs between the competing and often conflicting, interests of various stakeholders is to be made.

### 2.3 A director's fiduciaries duty

Since a company is a juristic person it cannot function without its human agency. It acts through its directors. In terms of section 66(1) of the Companies Act the day to day running of the company is the responsibility of the board of directors.<sup>146</sup> The common law duties of a director are his

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<sup>141</sup> Clarkson, M.B.E. (1995) *A stakeholder framework for analyzing and evaluating corporate social performance*. Academy of Management Review. 20:1.p92-117 in Op cit fn 51 at p59.

<sup>142</sup> Dowling, G.R. (2004) *Corporate reputations: Should you compete on yours?* California Management Review.46:3. p19-36. Op cit fn 51 at p59.

<sup>143</sup> Op cit 51 at p59

<sup>144</sup> Op cit fn 4 at p243-244.

<sup>145</sup> Op cit fn 4 at p249

<sup>146</sup> Op cit fn 118 at p383.



fiduciary duties of good faith, honesty, loyalty and the duty of care, diligence and skill. The effect of these duties is to ensure that directors don't exceed the boundaries of their duties and engage in misconduct. It is widely reported that "directors are fiduciaries who owe their fiduciary duties to the company to which they are due."<sup>147</sup> A fiduciary is said to be someone who acts on behalf of and in the interest of another person.<sup>148</sup> This relationship is based on trust and the premise that the board of directors will act in the best interest of the company.

Section 76(3)(b) of the Companies Act codifies the fact that a director at all times must act in the best interest of the company by which is meant the collective interests of the present and future shareholders.<sup>149</sup> The case of *Greenhalgh vs Arende Cinemas Ltd*<sup>150</sup> further enforces the point that "a company as a whole doesn't mean the commercial entity as distinct from its shareholders. It means that shareholders or incorporators as a general body."<sup>151</sup> The question arises as to whether directors in carrying out their fiduciary duties are mandated to take the interests of their stakeholders into consideration by spending corporate funds that do not belong to them to do so. A breach of a director's fiduciary duty can arise on one of two occasions. One being when the director makes an *ultra vires*<sup>152</sup> donation and the second being an instance where a director makes a donation that is *intra vires*<sup>153</sup> however the corporation does not benefit in any way.<sup>154</sup>

Franca argues that even if the majority of the shareholders vote in favour of a charitable donation the directors stand the risk of being sued by the

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<sup>147</sup> Op cit fn 118 at p463

<sup>148</sup> Blackman, MB. et al.(2002) *Commentary on the Company Act*. Juta Co Ltd.(2).p831.

<sup>149</sup> Op cit fn 118 at p469

<sup>150</sup> 1951 Ch 286 at 291 and (1950) 2 All ER 1120 @ 1126 E

<sup>151</sup> *Brady v Brady* 1988 BCLC 20 CCA and *Gaiman vs National Association for Mental Health* [1970] 2 AllER. p326.

<sup>152</sup> Donation is expressly prohibited by the corporations MOU.

<sup>153</sup> *intra vires* - within the legal power or authority of a person or official or body etc.  
Available at: <http://www.thefreedictionary.com/intra+vires>.accessed Accessed 29 March 13.

<sup>154</sup> Op cit fn 24 at p288

minority shareholders for breach of their fiduciary duties.<sup>155</sup> In order for a director not to be held liable for making charitable donations, the duties owed by a director need to be statutorily defined. If the MOI forbids charitable donations and the director goes ahead and makes a donation using company funds the director might as well be in breach of his/her fiduciary duty hence purely altruistic donations are not permitted. The concept that a company should be responsible to its stakeholders is rejected on the simple basis that to ask the board of directors to be responsible to everyone will result in the board of directors being responsible to no one.<sup>156</sup>

Directors of a company have to wrestle with the conflicting expectation of competing interest groups. In addition to acting in accordance with their fiduciaries duties, directors are expected to act as expert jugglers by balancing the act of managing shareholders expectations to maximise profits, with society's expectation to be socially responsible, environmentally responsible and to determine who their stakeholders are and to which of their demands to adhere to.

## 2.4 Values and emotions

The law applies sanctions and coercive measures in an attempt to control and regulate human behaviour and to prevent the violation of legal rules and prescriptions. Ethics on the other hand involves moral considerations, the contravention of which usually does not involve an official sanction.<sup>157</sup> One can argue that business and ethics should be kept separate as moral standards are vague and subjective. It is difficult to ascertain the ambit or content of moral norms as they differ from one person to another, rendering them incapable of properly providing guidance within business practice. Du Plessis strongly disagrees with this rationale, and asserts that moral standards have in so many other areas of life, including sport, politics and

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<sup>155</sup> Op cit fn 42 at p291

<sup>156</sup> Esser, I. (2008) *The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles*. Journal of International Commercial Law and Technology.3:3.p157-169.

<sup>157</sup> Op cit fn 20 at p349

law provided guidance for the actions of people, that it could also provide guidance in the sphere of business.<sup>158</sup> He also argues that the mere fact that it is difficult to ascertain the content of moral standards, does not mean that they don't exist and that they could not be objective.<sup>159</sup>

There is a significant risk that stakeholders may not base their opinions on facts pertaining to a situation, but rather base them on emotions, values, principles and opinions. Values and opinions are often then irreconcilable, suggesting that there may be no good way to satisfy all stakeholders. Michael Walden illustrates this conundrum as follows:<sup>160</sup>

"In Bangladesh, India and Nepal children between the ages of 8 - 10 worked in textile and carpet weaving industries, often under deplorable conditions. An NGO<sup>161</sup> lobbied importers from the west, manufacturers and governments to stop purchasing products from these factories. In 1993, in the USA the Harkin Bill was passed in order to prohibit the import of any products manufactured with child labor. Collective measure like these were successful in forcing manufacturers to reduce and eventually end the use of child labour. Subsequent to this UNICEF and other independent researchers have shown that many of the children displaced from these jobs have been forced to turn to begging or prostitution to survive."

The above mentioned clearly illustrates that human emotions and good intentions do not always lead to positive results. The intention may have been goodhearted and genuine however the consequences have unfortunately left the children worse off than before. Very few business people have qualifications in defining and acting in public interest with unintended consequences being the result of well-intentioned actions on the part of management.<sup>162</sup>

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<sup>158</sup> Op cit fn 20 at p349

<sup>159</sup> Op cit fn 20 at p349

<sup>160</sup> Op cit fn 116 at p68

<sup>161</sup> South Asian Coalition on Child Servitudes (SACCS)

<sup>162</sup> Op cit fn 51 at p601-602 and in Archie, B et al. (2010) *The business case for corporate social responsibility: A review of concepts, research and practice*. Blackwell Publishing Ltd. at p85-

## 2.5 Deceit, misrepresentation and unwarranted costs

Organisations often opt for the adoption of CSR practices in order to be recognised as trustworthy partners. The World Business Council for Sustainable Development<sup>163</sup> pointed out several actions that may damage corporate reputation and translate into negative financial repercussions yet research regarding the relationship between CSR and the financial performance of a company appears to be inconclusive.<sup>164</sup> Although various studies have been carried out there appears to be no conclusive proof that CSR is profitable to a corporation in the long term. However a study conducted by McKinsey and Company found that institutional investors in emerging markets are willing to pay a premium for investments in companies that maintain good governance practices.<sup>165</sup> This opens up the market for deceitful claims and practices by corporations. One such practice that is commonly used across the globe is that of green-washing.<sup>166</sup> Green washing is one of the practices that corporations engage in to gain popularity in terms of claiming that their practices are people and environmentally friendly. Green washing is defined as an act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.<sup>167</sup>

Critics claim that CSR is primarily about projecting a suitable image in order to impress critics to ensure business as usual.<sup>168</sup> Moral behaviour by corporations is said to build trust and enhance their reputation which in turn allows consumers to assume that companies with positive reputations will

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<sup>163</sup> Pearson, G. (2000) *Making profits and sweet music*. Business Ethics: A European Review. 9:3. p191-199.

<sup>164</sup> Op cit fn 24 at p286

<sup>165</sup> McKinsey & Company. (2005) *Investor opinion survey on corporate governance*. London: McKinsey & Company. Middleton, C. Interview with Michael.

<sup>166</sup> Lanthorn, K, *It's all About the Green: The Economically Driven Greenwashing Practices of Coca Cola*. Available at: [http://www.academia.edu/3403180/Its\\_all\\_About\\_the\\_Green\\_The\\_Economically\\_Drive\\_n\\_Greenwashing\\_Practices\\_of\\_Coca-Cola](http://www.academia.edu/3403180/Its_all_About_the_Green_The_Economically_Drive_n_Greenwashing_Practices_of_Coca-Cola). Accessed 23 May 13.

<sup>167</sup> Rory Murray Marketing Manager of Tuffy Brands.

<sup>168</sup> Hamann, R & Kapelys, P. (2004) *Corporate social responsibility in Mining in Southern Africa: Fair accountability or just greenwash*. 47:3. p85-92.

provide quality products, in turn generating more capital for them.<sup>169</sup> Organisations are often required to adopt corporate responsibility practices in order to be recognised as trustworthy partners in long term strategic relationships.<sup>170</sup> According to Terra Choice Environmental Marketing in 2009, 98% of all green claims made by South African corporations were tainted by green washing.<sup>171</sup>

Today the mission and vision statements of many corporations pay homage to their contributions to society in addition to the traditional product, market, and technology dimensions.<sup>172</sup> The mission statement of Lonmin Mines<sup>173</sup> paints a blissful picture of an employee friendly environment where all employees, their safety, development and further education (of both employees and their children) seems to be prioritised by the mining group. However a study carried out by the Bench Marks Foundation portrays a totally different picture.<sup>174</sup> The study showed that the levels of fatalities at Lonmin were in fact alarmingly high,<sup>175</sup> residential conditions were appalling<sup>176</sup> and the school that was built for the miners children is in a deplorable state. Lonmin Mines is but one example, there are many more corporations out there that reap the benefit of claiming green practices in spite thereof that their claims cannot be further from the truth.

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<sup>169</sup> Op cit fn 51 at p606

<sup>170</sup> Op cit fn 166 at p195.

<sup>171</sup> Available at: <http://www.news24.com/Sci Tech/News/Greenwashing-a-reality-inSA-> Accessed On 20 April 13.

<sup>172</sup> Op cit fn 51 at p604

<sup>173</sup> Mission statement of Lonmin Mines: To build a value-based culture, which is founded on safe work, continuous improvement, common standards and procedures, community involvement and one that rewards employees for high performance. Available at: [https://www.lonmin.com/about\\_us/](https://www.lonmin.com/about_us/). Accessed on 30 April 13

<sup>174</sup> A Review of Platinum Mining in the Bojanela District of the North West Province Published: August 2012. Available at: [http://www.bench-marks.org.za/policy\\_gap\\_6.htm](http://www.bench-marks.org.za/policy_gap_6.htm). Accessed 13 February 13.

<sup>175</sup> The number of fatalities had doubled since January 2011 yet Lonmin boasts having taken extensive steps in reducing fatalities. See Policy Gap 6, Op cit fn 173 at p72.

<sup>176</sup> The rapid deterioration of formal housing structure has forced miners to move into neighbouring informal settlements around the mines. Lack of electricity and sewage facilities have been also been noted. See Policy Gap 6 Op cit fn 173 at p73.

There is definite consensus among critics that the primary responsibility of a corporation is to maximise profits. However the point of departure is that this is corporation's only responsibility. It is obvious though, that corporates' do not exist in a vacuum and in developing economies like South Africa where its history has stifled development, there is a growing need for corporations to get involved in the stimulating of the economy by unconventional means.

Even Friedman conceded that corporations do not exist as islands. He went on to claim that companies could engage in social responsibility ventures so long as it was of benefit to the company. If translated to suit the South African context one could legitimately assume that should the Companies Act be amended so as to further legislate broader boundaries of a directors duties and if the same act mandates corporations to incorporate into the drafting of their Memorandums of Incorporation provisions to allow for charitable donations CSR in South Africa could become more than just a mere public relations exercise.

There are legitimate concerns and challenges relating to the implementation of CSR however for I am of the opinion that CSR is a viable option and an important component in South Africa's quest towards achieving economic stability, environmental stability and towards a more egalitarian society. The arguments in the preceding chapters will aim to illustrate this.

## Chapter Three

### 3. Arguments for the implementation of CSR

Arguments in favour of CSR typically begin with the belief that it is in the best interest of corporations to be socially responsible.<sup>177</sup> This is based on the premise that if the present generation of corporates take care of the environment and the community, they will ensure the long term sustainability of their business. Sustainability has been regarded as a process whereby the needs of the present generation are met without compromising the needs of the future generations.<sup>178</sup> In the corporate context sustainability means that “each enterprise must balance the need for long term viability and prosperity of the enterprise itself, the societies and the environment upon which it relies for its ability to generate economic value with the requirement for short term competitiveness and financial gain.”<sup>179</sup> Corporate sustainability is noted as being a custom made process and each organisation should choose its own specific approach towards achieving corporate sustainability.<sup>180</sup>

Werther and Chandler, argue that it is clear to most authors that CSR means to include behaviour and actions beyond mere profit making that serve to improve the conditions of society and individuals within the society within which a company operates.<sup>181</sup> In recent years pressure from Non-Governmental Organisations (NGOs) has shaped the behaviour of companies globally. These NGO's typically target the ability of corporations to be accountable, ensure social responsibility, prevent the violation of

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<sup>177</sup> Op cit fn 163 at p88

<sup>178</sup> Available at: <http://www0.sun.ac.za/sustainability/pages/english/home.php>. Accessed on 24 May 2013

<sup>179</sup> King Report on Corporate Governance for South Africa, 2002. 103.

<sup>180</sup> Garriga, E and Mele, D.(2004) *Corporate Social Responsibility Theories: Mapping the Territory*. Journal of Business Ethics. Kluwer Academic Publishers.(53). p51-71.

<sup>181</sup> Werther, W.B. and Chandler, D. (2004) *Strategic corporate social responsibility as global brand insurance*. Business Horizons.(48). p317-324.

human rights, guard against unfair labour practices and combat corruption and environmental abuses.<sup>182</sup>

NGOs' such as Amnesty International, Hope Association, Treatment Action Campaign, Black Sash, Green Peace, Friends of the Earth, and Oxfam pressure companies to abandon programmes that have serious impact on the environment and the community at large. Such actions influence the behaviour and loyalty of consumers and investors in relation to the corporation and their actions place pressure on corporations to act ethically beyond the requirements of the law.<sup>183</sup> In addition to guarding against the pressure placed on corporations by NGO's, corporations need to guard the dangers of class actions. These class actions have serious financial and reputation consequences to larger corporations. The negative publicity drawn by these groups through initiated class actions often result in corporations shaping their behaviours and business practises to be more socially responsible.<sup>184</sup>

The increased focus on sustainable management has led to global corporations placing great emphasis on the universal concept popularly known as the triple bottom line. The triple bottom line covers all areas of concern i.e economic, social and environmental.<sup>185</sup>

The implementation of CSR is alleged to have benefits for corporations which embraces it. Nurn and Tan differentiate between tangible and intangible benefits.<sup>186</sup> They define the tangible benefits to be those that are easily quantifiable in financial and physical terms and intangible benefits to

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<sup>182</sup> Kerr, M. et al. (2009) *Corporate social responsibility: A legal Analysis*. Markham, Ont: Lexis Nexis. p159-160.

<sup>183</sup> Op cit fn 4 at 242

<sup>184</sup> Frynas, JG. (2004) *Social and environmental litigation against transnational firms in Africa*. Journal of Modern African Studies.42:3. p363-388. Examples: Cape plc and RTZ have been sued in British courts for environmental damage and for breach of employment rights in Africa. Shell and Chevron are being sued in US courts for human rights abuses in Nigeria.

<sup>185</sup> Op cit fn 118 at p495.

<sup>186</sup> Nurn, CW and Tan, G. (2010) *Obtaining intangible and tangible benefits from corporate social responsibility*. International review of Business Research Papers. 6:4.p360-371.



be harder to quantify and non-physical in nature.<sup>187</sup> Mullerat identifies these benefits related to the management of a corporation's reputation; "as effective cost and risk management tools, attracting, motivating and retaining employees and enhancing market ranking and competitiveness."<sup>188</sup>

The remainder of this chapter will set out and discuss the following possible benefits, managing corporate reputation, effective cost and risk management tools, attracting, motivating and retaining employees, enhancing market ranking and competitiveness and the need to implement CSR in South Africa.

### 3.1 Managing corporate reputations

Odeleye asserts that CSR enhances corporate image and adds brand value.<sup>189</sup> The increase in societal expectations, the demands of business and globalization has led to firms increasingly operating in developing countries that have lower standards of living than found in their countries of origin. Stakeholder demands present a potential threat to the viability of an organisation; if not managed amicably this could seriously hinder business practices. Building and maintaining a positive relationship with the community could result in the corporation receiving tax benefits in addition to building positive community relationships. This positive outlook could also result in a decrease in the number of regulations imposed on the corporation because the firm would now be perceived as a member of the community.<sup>190</sup>

Many global corporations pay serious attention to reputational threats. Safe guarding their reputation and brand image has become ever more important; as markets have become more competitive, reputations and images have

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<sup>187</sup> Ibid fn187 at p361

<sup>188</sup> Op cit fn 45 at p3

<sup>189</sup> Odeleye, I. (2005) *Corporate social responsibility and the in-house counsel* in Mullerat, R. *Corporate social responsibility: the corporate governance of the 21st century*. Kluwer Law International. p451-2.

<sup>190</sup> Available at: <http://blogs.law.harvard.edu/corpgov/2011/06/26/the-business-case-for-corporate-social-responsibility/> Accessed on 16 May 13.

become more vulnerable.<sup>191</sup> Simply put, firms may be penalized by consumers and NGO's for actions that are not considered to be socially responsible. These groups demand that corporations take responsibility for their actions. An advancement of technology, vast media coverage and the use of the inter-net continues to fuel the rapid and widespread exposure of alleged corporate abuses. Messages can be posted, sent and received to and from all parts of the globe at any part of the day or night. These methods are easy to use and a cheap means to convey abuses internationally.

Boycotts and protests seem to be the most frequent tools that are used to get the attention of society. Research has found that product boycott announcements are associated with significant negative stock market reactions.<sup>192</sup> Stock market reactions reflect investor beliefs about boycotts having an effect on sales both directly and indirectly, through harm to the firm and the brand's reputation.<sup>193</sup> Research by Brown and Dacin found that "being negatively associated with CSR could ultimately result in detrimental effects on overall product evaluations, whereas positive CSR associations can enhance product evaluations."<sup>194</sup> Fig confirms this in his illustration of the mining sector in South Africa and the amount of controversy it generated when the targets for the draft black economic empowerment scorecard were leaked.<sup>195</sup> "This contributed to the acceleration of black ownership within the sector to 51 per cent within ten years."<sup>196</sup> Within a day, the Johannesburg Securities Exchange (JSE) fell to its lowest level in eight months."<sup>197</sup> The ability of a negatively perceived reputation to hamper the value of stocks isn't native to South Africa, the phenomenon extends globally.

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<sup>191</sup> Smith, NC. (2003) *Corporate social responsibility: not whether, but how?* Centre for marketing working paper. p15.

<sup>192</sup> Davidson, W. N. Et al. (1995) *Influencing Managers to Change Unpopular Corporate Behaviour Through Boycotts and Divestitures: A Stock Market Test*. Business and Society. 34:2. p171-196.

<sup>193</sup> Op cit fn4 at p242

<sup>194</sup> Brown, TJ and Dacin, PA. (1997) *The Company and the Product: Corporate Associations and Consumer Product Responses*. Journal of Marketing. (61). p69.

<sup>195</sup> Op cit fn 11 at p608

<sup>196</sup> Op cit fn 11 at p608

<sup>197</sup> Op cit fn 11 at p600

Shell and other oil corporations operating in the Niger Delta had to fork out millions of dollars to rectify the damaging effects that negative publicity had on their reputations.<sup>198</sup> The Niger Delta has been plagued with militant activities in an attempt to steal wealth from oil companies through illegal bunkering and oil facilities cannibalisation. According to Iwu-Egwuonwu this type of behaviour could be perceived to arise out of neglect and environmental pollution by companies such as Shell which operate in the region.<sup>199</sup>

According to Williams and Siegel before a consumer decides to support or avoid a particular brand they prefer to have the relevant information about the firm and the product.<sup>200</sup> A negative review about a product or service provider could serve as a deterrent to potential clients and customers. Nike, the foot wear and apparel giant, faced similar challenges. Allegations were made over employees working under sweatshop conditions at the premises of their Asian suppliers.<sup>201</sup> Nike was and is currently one of the market leaders in the footwear and the sports industry with its sales in 2012 amounting to \$25.28 billion.<sup>202</sup> The then CEO Phil Knight blatantly denied any knowledge or fault on their part however due to continuous campaigning by the NGO's he later admitted that "Nike had become synonymous with slave wages, forced overtime and arbitrary abuse."<sup>203</sup> To remedy the situations Nike quickly released a press statement emphasising that they had terminated three of their Indonesian suppliers' contracts citing work place conditions as their reason for the termination.<sup>204</sup>

Just as negative publicity acts as a blimp on a corporation's reputation, activities involving the local community create ideal opportunities to

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<sup>198</sup> Op cit fn 4 at p249

<sup>199</sup> Op cit fn 78 at p3

<sup>200</sup> Mc Williams, A and Siegel, D. (2001). *Corporate Social Responsibility: A theory of firm Perspectives*. Academy of management Review, (26)(1), 117- 127. In Op cit fn184 at p362.

<sup>201</sup> Op cit fn 4 at p249

<sup>202</sup> Annual financial for Nike Inc. Available at:

<http://www.marketwatch.com/investing/stock/nke/financials> Accessed 7 June 13.

<sup>203</sup> Op cit fn 80 at p17

<sup>204</sup> Op cit fn 80 at p17

generate positive press coverage. By extending a helping hand to the community these corporations will create a long lasting relationship with the community that almost guarantees customer and brand loyalty. This informal relationship also assists corporations to foster an open line of communication with the community.

### 3.2 Effectiveness, cost and risk management tools

As previously mentioned in chapter one globalisation has fuelled the need and the requirement for all corporations to become more responsible entities. The growth of economic trading zones has resulted in a flurry of corporations wanting to trade in the international trading arena and get themselves listed on the various international stock exchanges. In order for these companies to be enlisted on these international stock exchanges they need to fulfil a strict criterion with regards to reporting on social and environmental issues.<sup>205</sup>

Several studies have been carried out in an attempt to prove that there is a positive correlation between social responsibility and financial performance.<sup>206</sup> Empirical research has proven that being environmentally and socially proactive resulted in cost and risk reduction.<sup>207</sup> More so, the data accumulated from these surveys showed that “being proactive on environmental issues could lower the costs of complying with present and future environmental regulations enhancing the firm efficiencies and driving down their operating costs.”<sup>208</sup> The outcome of these studies have been criticised in that they have not been able to provide concrete proof that there is a positive correlation between CSR and positive financial performance. Nor have the studies succeeded in proving the contrary.

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<sup>205</sup> Around 80% of FTSE-100 companies now provide information on their social or environmental policies. In France, legislation introduced in 2002 makes such reporting mandatory.

<sup>206</sup> Frooman, J. (1997) *Socially irresponsible and illegal behaviour and shareholder*. Business and Society. 36:3.p221-250.

<sup>207</sup> Op cit fn 163 at p97

<sup>208</sup> Op cit fn 163 at p97

In developed countries the efficient use of resources and more efficient processes should help companies reduce their operating costs in the long run given that the amount of work needed to be done remains constant resulting in fewer employees being needed to complete the tasks at hand.<sup>209</sup> The reduction in costs and risks will be evidenced by the reduction in the firm's expenditure of capital in order to fix or maintain damages caused. The efficient use of human resources may have prior to the global recession been an ideal scenario in developed states however for developing countries where the unemployment rate is on a constant increase this may not be the case. This will be further explained in chapter five of this paper.

Corporations cannot survive on their own, customers are dependent on these companies for deliverance of services or products and corporations are dependent on their customers for their future sustainability. CSR in this instance is said to be motivated by a recognition that long term viability of corporations depends upon the prosperity of the environment in which they operate.<sup>210</sup> CSR is not limited to corporations merely taking on purely philanthropic gestures or about just doing the right thing but requires corporations to behave responsibly, and deal with suppliers who do the same. This is alleged to also offer direct business benefits.<sup>211</sup> Many corporations advertise themselves as having responsible corporate reputations which set them apart from the rest of their competitors.<sup>212</sup> Corporations often tend to favour suppliers and service providers who demonstrate responsible policies, as this can have a positive impact on how they are perceived by customers.

CSR has been viewed as a tool that assists in reducing the amount of resources, waste, emissions, electricity and packaging used. Saving the

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<sup>209</sup> Op cit fn 187 at p367

<sup>210</sup> Renewal Care Partners Becomes a Certified Benefit Corporation. (2013) Available at: <http://www.renewalcare.org/2013/07/12/renewal-care-partners-benefit-corporation/>. Accessed 24 April 2013.

<sup>211</sup> Italy, T. (2012) The business benefits of Corporate Social Responsibility. <http://www.emmamed.eu/news.asp?id=27>, Accessed on 140513.

<sup>212</sup> Op cit fn 176 at p89

environment and saving money is possible if implemented correctly. Bowman argues that the stock market responds to the social behaviour of the corporation in terms of the market price of its stocks which directly affects its costs of capital earnings.<sup>213</sup> He further argues that many institutional investors view corporations that are not socially responsible as riskier investments.<sup>214</sup> Many companies implement CSR policies not because it is the proper thing to do, but because it is the advantageous thing to do. Bowman and Haire further assert that firms with some social responsibility performed significantly better than those with none.<sup>215</sup>

Arguments advanced in support of CSR have long recognized enlightened self-interest as well as beliefs about good corporate citizenship and a beneficial social role of business.<sup>216</sup> According to Smith “the capitalist era benefited from the improved living conditions employees found in its factory towns and today’s modern corporations benefit from CSR as a result of avoiding or pre-empting legal or regulatory sanctions.”<sup>217</sup> CSR also has benefited firms through direct or indirect economic efficiencies.

### 3.3 Attracting, Motivating and Retaining Employees

CSR could also be used as a tool to develop employee competencies which could lead to more efficient utilisation of resources by the corporation.<sup>218</sup> Employment equity policies are said to enhance long-term shareholder value by reducing costs and risks.<sup>219</sup> According to studies undertaken by Frank, employees are willing to receive lower compensation in order to work for an

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<sup>213</sup> Mintzberg, H. (1983) *The case for social responsibility*. Journal of Business Strategy. p1-15.

<sup>214</sup> Bowman, EH. (1973) *Corporate Social Responsibility and Stock performance*. Academy of Management Journal. p479-486.

<sup>215</sup> Op cit fn 214 at p6

<sup>216</sup> Also see: Maitland, I. (2002) *Priceless Goods: How Should Life-Saving Drugs Be Priced?* Business Ethics Quarterly. p451 - 480. Maitland argues against restraints on drug pricing and profits, suggesting it is precisely because life-saving drugs are priceless that firms should be free to charge market prices for them. In fn 80 at p13.

<sup>217</sup> Op cit fn 80 at p13-14

<sup>218</sup> Hart, SL. (1995) *A natural resource-based view of the firm*. Academy of management review.(20).p986-1014 in Op cit fn 187 at p363.

<sup>219</sup> Available at: <http://blogs.law.harvard.edu/corpgov/2011/06/26/the-business-case-for-corporate-social-responsibility/> Accessed on 16 May 13.

employer who is commonly perceived to uphold higher moral values.<sup>220</sup> Research has also been undertaken and has proven that there is a positive correlation between social performance and the ability of the firm to attract employees.<sup>221</sup> CSR activities in the form of equal employment policies and practices and environmental responsibility can enhance long term shareholder value by reducing costs and risks.<sup>222</sup> Smith claims that in the labour market, employees express a preference for working for socially responsible companies, resulting in the employee trusting the employer.<sup>223</sup> With a larger pool of job applicants the socially responsible corporations will be able to choose suitably qualified, diligent employees.<sup>224</sup>

The implementation of CSR policies and practices in 1997 resulted in Nike employing 90 individuals in CSR positions, and revamping their website to provide customers with complete profiles of their factories in the various corners of the globe. They currently boast an employee friendly working environment that is in perfect harmony with their financial targets.<sup>225</sup> “CSR has been cited to assist corporations to attract a better calibre of employees which has assisted further in developing the corporations’ capabilities, resources and competencies.”<sup>226</sup> This was assumed to mean that socially responsible corporations uphold ethical values and are likely to be more responsible employers.<sup>227</sup> Socially responsible corporations have been further known to develop learning mechanisms, enhance information systems and

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<sup>220</sup> Frank, RH.1996. Can socially responsible firms survive in competitive environment? In Op cit fn 187 at p363.

<sup>221</sup> Op cit fn 181 at p364

<sup>222</sup> Smith, T. (2005) *Institutional and social investors find common ground*. Journal for investing. (14). p57-65. In Op cit fn 163 at p97.

<sup>223</sup> Op cit fn 163 at p99

<sup>224</sup> Op cit fn 187 at p364

<sup>225</sup> Available at: <http://www.nikebiz.com/crreport/content/people-and-culture/6-1-0-our-workforce.php?cat=our-workforce> Accessed. 15 May 13.

<sup>226</sup> Backhaus, K. B. Et al. (2002) *Exploring the relationship between corporate social performance and employer attractiveness*. Business & Society.41. pp. 292-318. In fn 181 at p363.

<sup>227</sup> Op cit fn 187 at p363

other internal resources which better facilitate preparedness and adaptation to changes in the environment.<sup>228</sup>

### 3.4 Enhancing Market Ranking and Competitiveness

Efficiency is defined by Nurn and Tan as the extent to which a corporation utilises its resources productively, its processes are efficient and cost effective.<sup>229</sup> The ability of a firm to perform better than its competitors depends on the unique interplay of human organisation and physical resources over time.<sup>230</sup> By streamlining their practices and processes, utilising their resources efficiently and minimising their costs corporations can differentiate themselves from their competitors, and by doing so, the company will benefit from a possible increase in revenue.<sup>231</sup>

According to Garriga and Mele, corporations have the necessary resources and the know how to solve problems relating to their missions.<sup>232</sup> If these corporations align their philanthropic initiatives to the companies missions, this could result in the creation of greater wealth.<sup>233</sup> The inability to access capital can pose a hindrance to corporations seeking to ensure that their organisations have a competitive edge against their rivals. An outstanding financial portfolio is no longer the sole factor considered in making investment decisions.<sup>234</sup> Institutional investors would rather pay a pretty premium and invest with corporations that have a solid governance structure.<sup>235</sup> "South African corporations have realised that environmental, social and governance (ESG) issues can no longer be considered as peripheral issues when making investments decisions."<sup>236</sup> This fact was emphasised by

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<sup>228</sup> Op cit fn 187 at p363

<sup>229</sup> Op cit fn 187 at p364

<sup>230</sup> Barney, J. (1991) *Firm resource and sustained competitive advantage*. Journal of Business Ethics (17). p99-120.

<sup>231</sup> Op cit fn 80 at p19

<sup>232</sup> Op cit fn 181 at p54

<sup>233</sup> Burke, L and Lodgson, JM. (1996) *How corporate social responsibility pays off*. Long range planning 29:4. p495-503.

<sup>234</sup> Op cit fn 4 at p10

<sup>235</sup> Op cit fn 4 at p10

<sup>236</sup> Available at: <http://www.asisa.co.za/index.php/info-centre/responsible-investment.html> Accessed on 12 July 13.



the adoption of the Code of Responsible Investment in South Africa (CRISA) which encourages institutional investors to integrate into their investment decisions with sustainability issues.

### 3.5 South Africa the need to implement CSR

As mentioned previously HIV/AIDS is socio-economic challenge that has forced itself upon business in South Africa. To some extent, business has had no option but to respond. The prevalence of HIV/AIDS has a direct influence on a company's workforce resulting in absenteeism, high turnover, loss of skilled workers and the draining of employee benefits with a potential loss in profitability.<sup>237</sup> This epidemic has had a huge impact on our economically active segments of society. The disease is likely to destroy the workforce in effect resulting in the loss of valuable skills and stable breadwinners whose families will then become dependent on the state's welfare system.<sup>238</sup> Dickinson argues that the responsibility to combat the disease by the industry has been slow if not erratic.<sup>239</sup> Fig states that "as much as 75% of the companies surveyed had no idea of the prevalence of HIV/AIDS in their firms and over 60% had no strategy to manage the disease in the workplace."<sup>240</sup> Strugnell argues that if the effects of HIV/AIDS are not managed the disease will contribute to the reduction of corporate profits by 20 per cent in the first decade of the century, as the private sector has been very slow in responding.<sup>241</sup>

The term CSR is rarely used in the South African context, as there is a common misgiving that the word 'responsibility' may imply acknowledging and offering to redress human rights violations that took place during the

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<sup>237</sup> Op cit fn 11 at p610

<sup>238</sup> Strugnell, D. (2000) *The XIII International AIDS Conference: has it broken the silence?.* Innes Labour Brief. 12: 1. p37-42. In Op cit fn 11 at p609.

<sup>239</sup> Dickinson, D. (2004) *Corporate South Africa's response to HIV/AIDS: why so slow?.* Journal of Southern African Studies. 30:3. p627-50. In op cit fn 11 at p609.

<sup>240</sup> Op cit fn 11 at p609.

<sup>241</sup> See fn 239 at p210

apartheid era.<sup>242</sup> In South Africa organisations place great emphasis on philanthropic acts without linking it to their core business practices. Limited government capacity has also been identified as a potential driver for CSR in South Africa, this creates a niche for organisations to take to developing and regulating responsibilities because the state is not fulfilling them.

Fig argues that companies should take responsibility and offer redress for violations that were conducted during the apartheid era. In most cases the victims were said to be black people who lived in industrial areas.<sup>243</sup> Fig strongly criticises the fact that the various definitions associated with CSR do not take into account the legacy and history of a country or state. He echoes the sentiments of other liberal writers that “corporations assisted the former political dispensation in promoting apartheid by introducing migrant labour systems, single-sex hostels racial division and discriminatory salaries.”<sup>244</sup> In addition to this, corporations paid taxes, provided services, technologies and weapons that were directly used for oppression.<sup>245</sup> Taking responsibility today in this democratic society of ours would imply taking action to acknowledge, recognize and offer redress for apartheid violations of human rights.<sup>246</sup> He further argues that in order to curb environmental pollution the South African Government urgently needs to enact legislation that contains stringent sanctions against such transgressions.<sup>247</sup>

I would agree with Fig to an extent that companies should take responsibility and offer redress, however my concern relates to determining which corporations should and would be held accountable. My reasoning for this is that ownership of corporations that operated during the apartheid era may have changed, new shareholders may have come on board and new entities many have been constituted post 1994. Unfortunately Fig does not provide

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<sup>242</sup> Op cit fn 11 at p601.

<sup>243</sup> Op cit fn 11 at p601

<sup>244</sup> Op cit fn 11 at p600

<sup>245</sup> Op cit fn 11 at p600

<sup>246</sup> Op cit fn 11 at p601

<sup>247</sup> Op cit fn 11 at p616

answers to these concerns in his paper and the examination of which is beyond the scope of this paper.

The end of apartheid was thought to herald an era of hope for the application of sustainable practices and retribution. However the Truth and Reconciliation process was used mainly to achieve amnesty. Nineteen years into democracy and there has been no advancement towards compelling corporations to clean up their acts.

South Africa joining the global trading arena has assisted the process to shift from cosmetic CSR towards making a real change. The desire to be listed on several international stock exchanges has increased the commitment by corporations to apply the triple bottom line approach. Compliance with Global Report Indexes (GRI) and global codes of conduct have impacted on the willingness of South African businesses to implement sustainable practices. In the South African context it is increasingly apparent that companies cannot view themselves as separate from the society in which they operate and whether this is by choice or the necessity of survival, they will be required to incorporate this thinking into their CSR policies.

Corporations in South Africa have implemented stringent environmental management systems however the application to date is lacking. These systems when implemented are on a voluntary basis because these corporations are keen on caring for the environment and society's well-being.<sup>248</sup> However in many corporations social responsibility spending is used as a mechanism of deflecting criticism of their unsustainable practices.<sup>249</sup>

The new democratic regime has attempted to somewhat address these short falls, however progress in the field is still very slow. Some momentum has been gained in the fight to implement CSR. Legislation and codes of conduct

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<sup>248</sup> Op cit fn 11 at p603

<sup>249</sup> Op cit fn 11 at p603

have been developed and implemented to further the CSR cause. The next chapter will shed more light on these developments.

## Chapter Four

### 4. Legislative reform in South Africa

South Africa is a democratic country that is blessed with natural resources, a moderate climate and a diverse society made up of citizens from various racial backgrounds. When the country obtained its democracy in 1994 it unfortunately inherited several legacies of the apartheid era. Nineteen years after South Africa's political transformation, its socio-economic structures still remain highly unequal. One of the direct consequences of apartheid was the exclusion of black people from participation in the economy.<sup>250</sup> This resulted in limited access to education, skills development and employment opportunities for black people.<sup>251</sup> Today the previously marginalised black majority have gained political power yet the country's economic basis still remains largely owned by the minority.

The regulatory framework within a state sets the boundaries for permissible behaviour in the market place. The importance of these frameworks is highly recognised in cases where markets do not incentivise socially responsible behaviour by corporations. Since there is no automatic penalties or heavy sanctions and fines for corporations who do not behave responsibly the implementation of these frameworks are predominantly voluntary. Hence the state in its attempts to remedy the effects of apartheid took to legislating on social issues. These pieces of legislation were modelled to promote the provisions of the pre-amble of the Constitution the Republic of South Africa ie the need to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."<sup>252</sup>

Based on this constitutional mandate, numerous acts have been passed by the government to compel greater transparency and accountability amongst companies in order to force them to deal with issues such as transformation,

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<sup>250</sup> Op cit fn 11 at p601

<sup>251</sup> Op cit fn 11 at p611

<sup>252</sup> Op cit fn 112 at p11

conditions of employment,<sup>253</sup> occupational health,<sup>254</sup> employment equity,<sup>255</sup> and the environment.<sup>256</sup>

For the purposes of this chapter the discussion will cover provisions of various pieces of legislation that have a direct bearing on the implementation of CSR within the South African economic sector, ie Broad-Based Black Economic Empowerment Act<sup>257</sup> (the B-BBEE Act), the Employment Equity Act<sup>258</sup> (the EEA) and the Companies Act. Although there have been various other pieces of legislation that have been enacted the discussion in this chapter will be limited to a brief overview of the above mentioned pieces of legislation. Chapter four will also consider Codes of Good Practice, such as the King Codes of Governance (I, II and III) and the JSE listing requirements.

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<sup>253</sup> See for example: Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997.

<sup>254</sup> See for example: Occupational Health and Safety Act 85 of 1993. The Act provides for the health and safety management systems and standards in the work place.

<sup>255</sup> See for example Broad-Based Black Economic Empowerment Act No. 53 (2003) – Which sets standards and provides guiding values for CSI implementation, stipulating that companies must address BBBEE in their actions. Only organizations that fulfil the BBBEE criteria can participate in public bid tenders. Also see Employment Equity Act No. 55 (1998) - Forbids unfair treatment in the workplace and specifies programmes for specific groups such as blacks, women, and disabled people. Also see Mineral and Petroleum Resources Development Act No. 28 (2002) – Setting down the demand that companies must continuously apply for mining licenses, this legislation hinges licensing renewals to the fulfilment of BBBEE requirements.

<sup>256</sup> See for example National Environmental Management Act No. 107 (1998) – Amongst other issues relations to access to natural resources, this Act makes companies liable for environmental damage. Also see National Water Act No. 36 (1998) – Stipulates that water is a national resource and requires that consumers acquire a state license. It also lays down strict rules for keeping water clean.

<sup>257</sup> Act 53 of 2003

<sup>258</sup> Act 55 of 1998

## 4.1 Legislation aimed at black economic empowerment

### 4.1.1 The Broad-Based Black Economic Empowerment Act<sup>259</sup> (the BBBEE Act)

During the apartheid era black communities had little to no access to primary educational institutions; these factors exacerbated the inequality amongst the different race groups within the country.<sup>260</sup> The B-BBEE Act was introduced by the government as a mechanism to assist in promoting economic transformation, in achieving an increase in the level of black participation in management, representation in the economy and in promoting investment programmes that empower rural communities.<sup>261</sup> The B-BBEE Act which was developed in cooperation with key stakeholders contains a complex framework of broad-based black economic empowerment (B-BBEE). This framework is legally binding on the public sector; however it is a largely voluntary, market driven instrument for the private sector. While the idea of B-BBEE seems to be favoured theoretically, implementation still remains a very sensitive and controversial issue. The B-BBEE Act has become an important focus for companies and has resulted in significant changes, including new board positions, preferential procurement initiatives, enterprise development, managerial structures and skills development.<sup>262</sup> While not explicitly framed as a CSR policy, it contains key clauses that refer to the need for social and economic transformation in the wake of apartheid.<sup>263</sup>

In order to promote the purposes of B-BBEE Act, the Minister of Trade and Industry in terms of section 9 is authorised to issue codes of good practice on

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<sup>259</sup> Op cit fn 257 at p164

<sup>260</sup> This chapter sets out a brief discussion on B-BBEE in South Africa. For a full discussion see paper on Corporate Social Responsibility and Black Economic Empowerment available at: <http://www.die.gdi.de>. Accessed on 25 June 13.

<sup>261</sup> Op cit fn 257 at section 2

<sup>262</sup> Op cit fn 257 at section 11

<sup>263</sup> Op cit fn 257 at section 10

black economic empowerment.<sup>264</sup> The preceding paragraph will provide a brief discussion on the Codes of Good Practice issued by the Minister.

#### 4.1.2 Codes of Good Practice

The foundation of our regulatory regime for corporations contains a variety of legal and regulatory measures as well as specific verification and certification mechanisms. One of these mechanisms is the Codes of Good Practice (the Codes). The intention behind these Codes is to “encourage all entities, both public and private, through the issuing of licenses, concessions, sale of assets and preferential procurement to implement proper B-BBEE initiatives.”<sup>265</sup>

The Codes thus provide a framework for measuring the progress made in the implementation and execution of B-BBEE measures.<sup>266</sup> This is done by means of a score card and compliance is measured by a box ticking process. In terms of the Codes, the compliance requirements for B-BBEE vary according to the size of your entity and the annual turnover. The B-BBEE Act gives further status to the codes by stating that:

“Every organ of the state and public entity must take into account and, as far as reasonably possible, apply any relevant code of good practice issued in terms of this Act in:

- determining qualification criteria for the issuing of licences, concessions or authorisations in terms of any law;
- developing and implementing a preferential procurement policy;
- determining qualification criteria for the sale of state-owned enterprises; and

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<sup>264</sup> Op cit fn 257 at section 9

<sup>264</sup> Available at:

[http://www.thedti.gov.za/economic\\_empowerment/docs/2nd\\_phase/2ExecutiveSummary.pdf](http://www.thedti.gov.za/economic_empowerment/docs/2nd_phase/2ExecutiveSummary.pdf). Accessed 01 June 13.

<sup>265</sup> Op cit fn 136 at p164



- developing criteria for entering into partnerships with the private sector.”<sup>267</sup>

Corporations with a turn-over of R35 million are compelled to comply with the scorecard.<sup>268</sup> The B-BBEE compliance of corporations needs to be certified by an external verification agency or they must assess themselves.

Verification agencies issue B-BBEE scorecard certificates, which are valid for twelve months. These certificates can be issued by any verification agency as long as it is approved by the accreditation body, South Africa’s National Accreditation System (SANAS). SANAS has to ensure that verification is independent and reliable in order for corporations to benefit from their certification.<sup>269</sup>

#### 4.1.3 The Employment Equity Act<sup>270</sup>

It is crucial that South Africa empowers groups that have suffered discrimination and that have been denied equal access to opportunities in the past. The EEA emphasizes the fact that “as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws...”<sup>271</sup>

The intention behind the EEA, was to eliminate unfair discrimination in the employment arena and to provide for affirmative action in order to redress

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<sup>267</sup> Op cit fn 257 at section 10

<sup>268</sup> Available at: <http://www.bee-verification.co.za/> Accessed 01 June 13

<sup>269</sup> Benefits associated with receiving a B-BBEE compliance certificate. 1. Having been BBBEE certified will allow corporations to tender for government contracts. This proceeds received from these contracts will increase in the profit making ability of a corporation and in turn increase the shareholder value. 2. BBBEE certification will also assist corporations competing in the economic value chain. 3. Smaller corporations that have a B-BBEE certification can now compete against larger companies as suppliers. 4. Corporations are afforded preferential supplier status on the database of Municipalities and Government Organisations.

<sup>270</sup> Op cit fn 258

<sup>271</sup> See Preamble op cit fn 258

the disadvantages of the past created by apartheid.<sup>272</sup> Affirmative action is defined as a temporary intervention that is aimed at getting rid of unfair discrimination that was experienced by black people in order to enable them to compete on an equal footing with those who did not suffer unfair discrimination.<sup>273</sup> Himma argues that affirmative action was to assist with narrowing the gap between rich and poor for certain preference recipients.<sup>274</sup>

The term “black people” as defined in the EEA “is a generic term which means Africans, Coloureds and Indians.”<sup>275</sup> Unfortunately when adopting these affirmative action measures many public and private entities neglected to take this definition into account. Rather than decreasing the inequality amongst the citizens of South Africa, affirmative action further divided people. The benefits of affirmative action measures were only afforded to a particular race group without consideration being given to others. Inequalities within the population continued, as the wealth did not trickle down.<sup>276</sup>

#### 4.1.4 The Companies Act<sup>277</sup>

The Companies Act was signed by the President on 9 April 2009 and came into operation on 1 May 2009.<sup>278</sup> The purpose of the Act is to promote compliance with the Bill of Rights as provided by the Constitution in the application of the Companies Act to encourage transparency, high standards of corporate governance and provide for the balancing of rights and obligations of shareholders and directors amongst other things.<sup>279</sup> In terms of

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<sup>272</sup> See Section 15 op cit fn 258

<sup>273</sup> Rossouw, D. (1994) *Business ethics: A Southern African Perspective*. Halfway House Southern Book. p7.

<sup>274</sup> Himma, K. (2001) Discrimination and disidentification the fair-state defences of affirmative action. *Journal of Business ethics*. (30). p277-289.

<sup>275</sup> Op cit fn 258 at definitions section

<sup>276</sup> Available at:

[http://ccms.ukzn.ac.za/index.php?option=com\\_content&task=view&id=683&Itemid=86](http://ccms.ukzn.ac.za/index.php?option=com_content&task=view&id=683&Itemid=86)  
Accessed on 18 June 13.

<sup>277</sup> Act 71 of 2008

<sup>278</sup> Available at: [http://www.bdo.co.za/documents/BDO\\_CA2008\\_elec\[1\].pdf](http://www.bdo.co.za/documents/BDO_CA2008_elec[1].pdf) Accessed on 10 June 13.

<sup>279</sup> Act 108 of 1996

section 76(3) of the Companies Act a director is required to act in the best interests of the company exercising a degree of care, skill and diligence that may reasonably be expected.<sup>280</sup>

According to Cassim the wording of this provision “removes any doubt that the directors of a company owe their duty to the company and the company alone.”<sup>281</sup> In *Greenhalgh v Arderne Cinemas Ltd*<sup>282</sup> the court held that the word company does not refer to the legal entity but includes shareholders and incorporators as a general body.<sup>283</sup> The clear implication of this is that the interests of stakeholders are afforded limited consideration in making business decisions.<sup>284</sup> The question still remains as to whether directors are allowed to use corporate funds for the betterment of society. This takes us back to the stakeholder debate that began in the 1930's.<sup>285</sup> Prof Berle argued that “powers granted to management are exercisable only for the benefit of the shareholders of the company.”<sup>286</sup> Patrons of this school of thought argue that corporations pay taxes to ensure that social and environmental concerns are taken care of.<sup>287</sup> This common law<sup>288</sup> principle was also confirmed in the American case of *Dodge v Ford Motor Company*<sup>289</sup> where the court found that a company's primary objective is to make a profit for its shareholders and that the director may not reduce the profits in order to benefit the public.<sup>290</sup>

Contrary to this, Prof Dodd argues that a company is an economic institution performing a social service as well as a profit making function.<sup>291</sup> As

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<sup>280</sup> Section 76 (3)(b) of Act 71 of 2008

<sup>281</sup> Op cit fn 118 at p467

<sup>282</sup> 1951 Ch 286 at p291; 1950 2 All ER 1120 at 1126E

<sup>283</sup> Op cit fn 118 at p468

<sup>284</sup> Op cit fn 118 at p470

<sup>285</sup> Op cit fn 118 at p470

<sup>286</sup> Op cit fn 118 at p324

<sup>287</sup> Berle, A. (1931). *Corporate powers as powers in trust*. 44. Harvard Law. p1049.

<sup>288</sup> Common law is law that isn't written in the statute books of a country but which, through custom, usage and court decisions, has gained the force of law. South African common law draws heavily from English Law and although not strictly binding English company law cases have continued to exert significant influence on the decision of our courts. See op cit fn 4 at p31

<sup>289</sup> Op cit fn 11 at p472

<sup>290</sup> Op cit fn 118 at p472

<sup>291</sup> Op cit fn 118 at p471

previously stated in this paper corporations do not exist in asylum. In a country like South Africa it is important that the interests of stakeholders are considered. The courts have also come to realize that in order for corporations to be financially viable and sustainable they need to take into account stakeholder interests in the day-to-day running of a corporation.

In *Hutton v West Cork Railway Company*<sup>292</sup> (Hutton's case), "the board of directors of the company that was being wound up proposed to give gratuities to corporate officers for loss of employment."<sup>293</sup> The court held in this case that the law does not say that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company.<sup>294</sup> The principle set out in Hutton's case translates into the modern day enlightened shareholder approach. This approach regards charitable gestures that are made by corporations as acceptable if they are to benefit the company.<sup>295</sup> The courts have not completely negated charitable donations, but they have insisted that these donations must be bona fide and reasonably incidental to the business of the company and for its benefit.<sup>296</sup>

Section 7(d) of the Companies Act, further cements this idea. According to Esser this section isn't intended to create *sui generis* duties for directors; rather it should be interpreted to mean that directors must pay attention to the interest of stakeholder.<sup>297</sup> However this does not afford all stakeholders direct rights nor does it mandate directors to engage in philanthropic gestures.

## 4.2 Remedies available to aggrieved persons

The Companies Act has made some progress in affording due consideration to the interests of stakeholders and the protection thereof. For the purposes

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<sup>292</sup> (1883) 23 Ch D 654 (CA) 673

<sup>293</sup> Op cit fn 118 at p472-473

<sup>294</sup> See Per Bowen LJ in *Hutton v West Cork Railway Company* (1883) 23 Ch D 654 (ca) 673

<sup>295</sup> Op cit fn 118 at p473

<sup>296</sup> See *Evans v Brunner Mond & Company Ltd* 1921 ChD 359 and *Re Lee Behrens & Co Ltd* 1932 2 ChD 46, in Op cit fn 116 at p470.

<sup>297</sup> Op cit fn 54 at p324

of this paper I will concentrate specifically on the remedy provided in section 218(2). Section 218(2) “affords protection to any persons that have been aggrieved by the contravention of the Companies Act.” In essence section 218(2) creates a “scope for claims for damages against any person who contravenes the Act and perhaps even against the company itself, on the basis that an act of the board of directors could constitute an act by the company itself.”<sup>298</sup> Although the current Companies Act takes a bolder pro-stakeholder inclusive approach, only a certain group of stakeholders are given due recognition. It is unfortunate that true effects of the act will only be realised once the courts and companies reconfigure their understanding of the concept best interests of the company.

#### **4.3 The Social and Ethics Committee**

More recently the requirement for certain companies to appoint a Social and Ethics Committee has reflected a direct intervention by government to shape CSR policies. Section 72(4) read in conjunction with Regulation 43 of the Companies Act makes significant changes in terms of accountability and reporting by corporations in South Africa. The section empowers the minister to prescribe by regulation that a company or category of persons must have a Social and Ethics Committee (the Committee) if it is in the public interest. The company’s annual turnover, the size of its workforce or the extent of its activities are some factors that are considered in determining whether a company needs to appoint the Committee.

In terms of Regulation 43(4), a company’s social and ethics committee must comprise of no less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company’s business, and must not have been involved within the previous three financial years.

The committee has three main functions. The first is to monitor the company’s activities having regard to relevant legislation or codes of conduct

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<sup>298</sup> Op cit fn 118 at p743

and to ensure that the company behaves like a responsible corporate citizen.<sup>299</sup> The committee monitors the company's activities with regard to the following five areas of social responsibility. These five areas are “social and economic development, good corporate citizenship, the environment, health and public safety, consumer relationships and labour and employment.”<sup>300</sup>

The second function is to draw matters within its mandate to the attention of the Board as and when the occasion requires, and the third is to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.<sup>301</sup> The committee thus has dual monitoring responsibility. Firstly in terms of regulation 43(5)(b) the Committee is to draw matters within its mandate to the attention of the board of directors when required and secondly in terms of regulation 43(5)(c) the Committee has a responsibility to report to its shareholders at the company's annual general meeting. The Committee's functions seem to be limited to the provisions contained in the regulations which could result in the Committee not having a supervisory role.<sup>302</sup>

Section 7(d), which deals with the purposes of the Act, “reaffirms the concept of corporations as a means of achieving economic and social benefits.” This specific purpose of the Act emphasizes the need for corporations in South Africa not to be regarded as vehicles for merely producing benefits for shareholders of corporations. The introduction of the Committee in the Act can thus be seen as a mechanism for ensuring that companies do indeed monitor and report whether they produce social benefits to the economy, the labour force, society, and the natural environment.

By making it compulsory for certain companies to appoint a Social and Ethics Committee, government has created a reporting mechanism through

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<sup>299</sup> Op cit fn 118 at p474

<sup>300</sup> See regulation 43(5)

<sup>301</sup> Op cit fn 118 at p522-523

<sup>302</sup> Op cit fn 54 at p326

which corporate social responsibility issues can be brought to the attention of the board and to shareholders at an annual general meeting. By requiring monitoring of corporate activities with reference to legal requirements, prevailing codes of best practice in general and national legislation, the regulations mandate a specific focus for the committee.

Further, by requiring the Social and Ethics Committee to report on good corporate citizenship with specific focus on the promotion of equality and development of the communities in which it is operating, it requires companies to take a holistic approach in formulating CSR strategies, to consider the underlying needs of development and sustainability. By mandating reporting on health, the environment, public safety and community development, companies are now required by law to institute a form of triple bottom line reporting that considers relevant stakeholders. Stakeholders specifically mentioned are consumers, employees, communities in which they operate, the environment and others.

#### **4.4 Codes of Good Governance: The King Reports**

##### **4.4.1 King Code I & II**

In response to increased concerns over several corporate failures the Institute of Directors published the First King Report (King I) on Corporate Governance in 1994. King Code I sought to assist companies and their directors by providing a comprehensive set of principles and guidelines to codify, clarify and expand upon the common law principles of corporate governance.<sup>303</sup> It was intended as a code of good practice that emphasised the responsibilities of company directors with regard to corporate governance. King II acknowledged that there was a move away from the view that the aim of incorporating a business entity is solely to maximise profits for shareholders to that of the triple bottom line, “which embraces the

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<sup>303</sup> Walker, D and Meiring, I. (2010) *Legal brief on King Code and developments in corporate governance*. p1-4.

economic, environmental and social aspects of a company's activities."<sup>304</sup> The approach taken in King II was that corporations would have to comply with the King Codes or explain their non-compliance.<sup>305</sup> According to Naidoo many of the "recommendations contained in King I and King II have been incorporated into the Labour Relations Act, EEA, Basic Conditions of Employment Act and the Companies Act."<sup>306</sup>

#### 4.4.2 King Code III

Changes in the company law regime and the need to conform to international governance trends necessitated the need to review King II.<sup>307</sup> King Code III<sup>308</sup> (King III) came into effect on 1 March 2013. King III advocates a holistic approach to CSR that requires a company to view itself as a corporate citizen motivated by principles of development and sustainability; taking into account all of its stakeholders.<sup>309</sup> In keeping with international trends, it explicitly references the triple context approach, otherwise referred to as the triple bottom line. The code also calls for integrated reporting to ensure that a complete picture is painted with regards to business activities. King III promotes the stakeholder inclusive approach by acknowledging that a corporation has many stakeholders and that can affect the corporations ability to achieve its long term strategy and sustainable growth.<sup>310</sup> King III also recommends that corporations adopt integrated forms of reporting and that the reports provided should contain sufficient information to enable stakeholders to clearly understand how the

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<sup>304</sup> Op cit fn 54 at p327

<sup>305</sup> Op cit fn 4 at p34

<sup>306</sup> Op cit fn 4 at p33

<sup>307</sup> Op cit fn 4 at p34

<sup>308</sup> King III: Report on Governance for South Africa – 2009.

<sup>309</sup> See King Code III: Chapter 1: Deals with Ethical leadership

Chapter 8: Deals with stakeholder relationships

Chapter 9: Deals with integrated reporting and disclosure.

<sup>310</sup> Olson, FJ. (2010) *A global model of corporate governance*. Modern day company law for a competitive South Africa Economy. Juta and Co Ltd. p222.



corporation has impacted on the community either in a positive or negative manner.<sup>311</sup>

Unlike King II, King III requires corporate entities to apply King III or explain why the code was not applied. Its predecessor that applied to only affected companies,<sup>312</sup> but King III applies to all companies irrespective of size or structure.<sup>313</sup> The 'comply or explain' approach adopted in King II allows a Board of Directors to explain why it is not appropriate for it to adopt a corporate governance measures.<sup>314</sup> According to Naidoo this approach is said to have suggested an element of enforcement and sanctions for non-compliance.<sup>315</sup> King III takes on the approach of 'apply or explain'. This enables companies to operate for the purposes for which they were intended, without being bound to follow inflexible standards.<sup>316</sup> King III also takes a pro-stakeholder inclusive approach by giving due consideration to issues such as ethical leadership and corporate citizenship, stakeholder relationships and it also deals extensively with sustainability reporting.<sup>317</sup>

#### 4.5 Johannesburg Stock Exchange Listing Requirements

Much of the progress in improving corporate governance throughout the world has come about through contracted and consensual agreements, or statement of principle, that are not codified by the statute but rather rely on enforcement through market forces.<sup>318</sup> Studies have shown that<sup>319</sup> "the urge

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<sup>311</sup> King ME. (2010) *Synergies and interaction between King III and the Companies ACT 61 OF 2008*. Modern day company law for a competitive South Africa Economy. Juta and Co Ltd. p447

<sup>312</sup> Op cit fn 4 at p275

<sup>313</sup> Op cit fn 4 at p275

<sup>314</sup> Summary of report on Governance for South Africa. (2009). King iii King Committee on Governance. Available at: <http://www.auditor.co.za/Portals/23/king%20111%20saica.pdf> Accessed 13 June 13.

<sup>315</sup> Op cit fn 4 at p34

<sup>316</sup> Op cit fn 118 at p299

<sup>317</sup> Op cit fn 54 at p328

<sup>318</sup> Olson, JF. (2009) *South Africa moves to a global model of Corporate Governance but with important National variations*, in Mongalo, T. (2009) *Modern Company Law for a Competitive South African Economy*.

to be listed in ethical indexes has led some of the largest listed companies to disclose social and environmental information and to include social issues as part of their strategic goals and plans.”<sup>320</sup>

The JSE listing Requirements (listing requirements) contain mandatory provisions to which listed corporations must comply.<sup>321</sup> The JSE is the 16<sup>th</sup> largest securities exchange in the world, and by far the largest of Africa's 22 stock exchanges.<sup>322</sup> The JSE acts as a regulator of its members and ensures that markets operate in a transparent manner in harmony with international listing requirements. All corporations intending on trading on the JSE must apply for listing and must be in compliance with the listings requirements. These requirements determine the criteria and regulate the conduct of listed companies planning to list their shares on the JSE.<sup>323</sup> They are continuously being reviewed to ensure that practice that has developed is incorporated, that they are aligned with international practices and that feedback from sponsors and issuers are incorporated.<sup>324</sup>

The JSE's role includes but is not limited to regulating applications for listing, monitoring applications for alterations to existing listings, and scrutinizing company disclosures to the public. The advantage of listing on the JSE is that it provides an organised and accessible securities market.<sup>325</sup> Listing on the JSE may be terminated should the user fail to comply with the listing requirements.<sup>326</sup> The listing requirements contain a stringent method of compliance. Corporations have a choice to comply and confirm their

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<sup>319</sup> Madariga de G and Valor. *Analysis of implementation of the socio-economic model of business among Spanish MNC's*. p3, in Valor, C. (2005) *Corporate Social responsibility and corporate citizenship: towards corporate accountability*. Business Society Review. 110:2. p1991-212.

<sup>320</sup> Op cit fn 4 at p198

<sup>321</sup> Op cit fn 4 at p221

<sup>322</sup> Available at:

[http://www.joburg.org.za/index.php?option=com\\_content&id=106&Itemid=58](http://www.joburg.org.za/index.php?option=com_content&id=106&Itemid=58)

Accessed on 13 June 13.

<sup>323</sup> Op cit fn 4 at p28

<sup>324</sup> Op cit fn 4 at Preface

<sup>325</sup> Available at: <http://www.psgonline.co.za/trade/jse.php> Accessed on 24 May 13.

<sup>326</sup> JSE Listing requirement 1.9

corporations listing on the JSE or don't comply and stand a very real risk of being delisted.

#### **4.6 Examples of Global best practices:**

The concept of CSR has gained prominence worldwide. This part of the paper will briefly examine recent trends in the implementation of CSR principles in various jurisdictions ie Germany, United States of America, the United Kingdom and OECD countries. Attention will be paid to the laws and codes that were passed in an attempt to regulate CSR and the principles which embrace socio-ethical behaviour of companies and its management.

##### **4.6.1 Germany**

The German Corporate Governance Code (the German Code) presents essential statutory regulations for the governance of German listed companies and contains internationally and nationally recognized standards for good and responsible governance. The German Code aims at making the German Corporate Governance system transparent and understandable by promoting the trust of investors, customers, employees and the general public in the management and supervision of listed German stock corporations.<sup>327</sup> German law has generally favoured the execution of CSR principles especially in terms of considering the interest of stakeholders. Unlike South African Company Law, in Germany the interests of the company are interpreted to include the interest of investors, customers, the state and society.<sup>328</sup> The German two-tier board system makes provision for public companies consisting of a Management Board<sup>329</sup> and a Supervisory Board.<sup>330</sup> This system allows for extensive labour representation. The Management Board is responsible for managing the enterprise and its

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<sup>327</sup> Available at :

[http://www.ecgi.org/codes/documents/cg\\_code\\_germany\\_15may2012\\_en.pdf](http://www.ecgi.org/codes/documents/cg_code_germany_15may2012_en.pdf)  
Accessed 24 June 13.

<sup>328</sup> Op cit fn 4 at p308.

<sup>329</sup> See Principle 4 and Foreword of German Corporate Governance Code as mended on 15 May 2012 .

<sup>330</sup> See Principle 5 and Foreword of German Corporate Governance Code as mended on 15 May 2012.

members are jointly accountable for the management of the enterprise. The Supervisory Board appoints, supervises and advises the members of the Management Board and is directly involved in decisions of fundamental importance to the enterprise by adopting integrated decision making practices.

#### 4.6.2 United States of America

In the United States “traditional state and corporate law doctrine establishes that directors and officers of both public and private companies owe their fiduciary duties to shareholders alone.”<sup>331</sup> There is no law which directly mandates directors to consider the interests of stakeholders however recently there have been laws, regulations and guidelines which focus on influencing CSR.<sup>332</sup> According to principle 2.01(b)(3) of the American Law Institute Principles of Corporate Governance and Recommendations a company is entitled to ‘take into account ethical considerations that are reasonably, regarded as appropriate for the responsible conduct of business and it can do all of these things even if corporate profits and shareholder gains are not thereby enhanced.’<sup>333</sup> This provision permits directors to consider not only interest of shareholders but also that of stakeholders. One should however be cautioned that these principles are not mandatory and their application is highly dependent on the willingness of the directors of a corporation.

Like several other jurisdictions the promulgation of statutes was a contributory factor in the implementation of CSR practices. Increased public pressure and a call for greater corporate accountability within the US resulted in the enactment of the Sarbenes-Oxley Act (SOX) in July 2002.<sup>334</sup> The Act was enacted with the intention of enhancing transparency, integrity

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<sup>331</sup> Carillo, EFP. (2007) *Corporate governance: Shareholders interests and other stakeholders interest*, Corporate ownership and control.4:4. p96-99.

<sup>332</sup> American Law Institute’s Principles of Corporate Governance states that ‘a corporation:’ should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.’

<sup>333</sup> American Law Institute *Principles of corporate governance and recommendations* (1994) principle 2.01(b) (3).

<sup>334</sup> Op cit fn 4 at p106

and oversight of financial markets with the aim of restoring investor trust in public companies.<sup>335</sup> SOX requires companies to disclose and observe their codes of ethics. The Business Judgment Rule in relation to the duties placed on directors further influences CSR. In terms of this rule the court cannot interfere with the benefit of hindsight, in honest, reasonable and informed business decisions of the directors of the company.<sup>336</sup> Therefore, directors can consider the interests of stakeholders and engage in integrated decision making in all circumstances, on conditions that they are acting in the best interests of the company.<sup>337</sup> The business judgment rule has also been adopted in Australia and a similar provision has been provided for within section 76(3) of the South African Companies Act.<sup>338</sup>

#### 4.6.3 United Kingdom

The unitary board model adopted in the United Kingdom is very similar to the South African Corporate Governance system.<sup>339</sup> Section 172(1) of the UK Companies Act, 2006 provides for the wider duty of directors to promote the success of the company. These directors are required to take into account the interests of stakeholders and the long term consequences of their business decisions.<sup>340</sup> Cassim argues that section 172(1) adopts the enlightened shareholder value approach, by requiring directors to act in good faith that would mostly promote the success of the company as whole.<sup>341</sup> Unfortunately, since the duty of directors is owed to the company, the duty to consider interests of stakeholders is subordinate to the interest of shareholders hence stakeholders cannot directly enforce the duty mentioned in section 172.<sup>342</sup> In South Africa stakeholders are afforded protection in

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<sup>335</sup> Op cit fn 4 at p106

<sup>336</sup> Op cit fn 118 at p513.

<sup>337</sup> Cassim, FHL. (2011) *Contemporary Company law*. Juta and Co Ltd. p513.

<sup>338</sup> See Corporations Act 2001 – Available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/s180.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s180.html). Accessed on 25 May 13.

<sup>339</sup> Op cit fn 4 at p313

<sup>340</sup> Section 172 (1) of the UK Companies Act of 2006.

<sup>341</sup> Op cit fn 337 at p472

<sup>342</sup> Op cit fn 337 at p472

terms of section 218 of the Companies Act, however apart from this stakeholders have no other form of enforcement mechanisms.

Directors of listed public companies, must provide relevant information and appropriate business related performance indicators about the company's employees, social and community issues, and environmental matters.<sup>343</sup> These requirements are further supplemented by the development of the European Union Directives on Accounting and Reporting (EU Directives). The EU Directives signify that relevant disclosures should not be restricted to financial aspects of a corporations business. This would lead to an analysis of environmental and social aspects necessary for the understanding of the company's development, performance or position.<sup>344</sup>

#### **4.6.4 Organization for Economic Cooperation and Development (OECD)**

The origins of the OECD dates as far back as the 1960's. Eighteen European countries, the United States, and Canada joined forces to create an organization dedicated to global development. The current 34 member countries span the globe, from North and South America to Europe and the Asia-Pacific region. They include many of the world's most advanced countries but also emerging countries like Mexico, Chile and Turkey.<sup>345</sup> The goal of OECD is to build a stronger, cleaner, fairer world. It does this by using its wealth of information on a broad range of topics to help governments' foster prosperity and fight poverty through economic growth and financial stability.<sup>346</sup> They also assist in ensuring that environmental implications of economic and social development are taken into account. The OECD has adopted two documents to ensure that these principles are adhered to.<sup>347</sup>

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<sup>343</sup> Section 100 of the United Kingdom Companies Act 2006

<sup>344</sup> Directive 2003/51/EC

<sup>345</sup> Available at: <http://www.oecd.org/about/membersandpartners/> Accessed 240613

<sup>346</sup> Available at <http://www.oecd.org/about/whatwedoandhow/> Accessed 240613

<sup>347</sup> The Principles of Corporate Governance of 2004(OECD Principles) and the OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business in a Global Context as reviewed in 2011 (OECD Guidelines) in its pursuit of the implementation of CSR principles.

The OECD Principles introduces the concept of CSR by providing that: “corporate governance involves a set of relationships between a company’s management i.e. its board, its shareholders and other stakeholders.”<sup>348</sup> These principles further recognise that corporate ethics and corporate awareness of environmental and societal interests of communities in which a corporation operates can also have an impact on its reputation and its long-term success.<sup>349</sup> Hence the principles require that the board of directors should act in the best interest of the company and its shareholders while taking into account the interests of other stakeholders including employees, creditors, customers, suppliers and local communities. The OECD Guidelines<sup>350</sup> seek to encourage and reinforce the private initiatives for corporate social responsibility by multinational enterprises and they also contain voluntary recommendations to multinational enterprises in all major areas of business ethics.<sup>351</sup> The OECD Guidelines also require multinational companies to provide disclosure of all material matters regarding their activities, structure, and financial situation and performance.<sup>352</sup>

According to Villiers “CSR should not be left in the hands of companies. An enabling environment is necessary to allow all companies to act responsibly. Hence she advocates for the creation of enforceable regulations that will ensure that CSR isn’t just an inspirational term.”<sup>353</sup> Karani asserts that the

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<sup>348</sup> The OECD principles of corporate governance (2004) at p11

<sup>349</sup> Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1659586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1659586) Accessed on 14 June 13.

<sup>350</sup> The Multinational Enterprises: Recommendations for Responsible Business in a Global Context as reviewed in 2011 OECD Guidelines

<sup>351</sup> To obey domestic laws, contribute to economic, environmental and social progress with a view to achieving sustainable development, respect human rights, encourage local capacity building, refrain from seeking or accepting exemptions not contemplated in the laws relating to human rights, environmental, health, labour, taxation; create employment; uphold good corporate governance; create mutual relationship and confidence with the society where they operate; refrain from discriminatory or disciplinary action against workers who make bona fide reports to management or competent authorities, on practices which contravene the law; engage stakeholders in decision making; OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business in a Global Context as reviewed in 2011 at p11.

<sup>352</sup> Op cit fn 42 at p1049

<sup>353</sup> Villiers, C. (2008) *Corporate law, Corporate power and corporate social responsibility* in Op cit fn 54 at p333.

ultimate solution to the CSR dilemma is government regulation.<sup>354</sup> By legislating governments will ensure that corporations will have no choice but to comply or be liable for sanctions. Esser also shares a similar view to that of Karani.<sup>355</sup>

One should be wary of the fact that legislation and regulations are subject to interpretation and this could be used by corporations as a mechanism to escape liability.

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<sup>354</sup> Karani, A. (2012) *The case against corporate social responsibility*. The Wall Street Journal.p4.

<sup>355</sup> Op cit fn 54 at p334, Esser argues that legislation should be used as one of the main instruments enabling government to address the private sector social, environmental and economic impact.



## Chapter Five

### 5. Conclusion

*“There are no solutions to the problems of poverty, population and environment without the active engagement of the private sector, and especially the large multinational companies. Yet the main objective of such companies are to earn profits rather than to meet social needs. The two are definitely not incompatible, but they are not the same. It will take hard work to bring the leaders of business, government and non-governmental organisations to ensure that private sector incentives and societal needs are harmonised.....”<sup>356</sup>*

In many ways I would agree with the words of Sachs, in order for the full potential of CSR to be recognised government, society and corporations need to work together. Unfortunately a large part of the main objective of most corporates still remains the maximisation of profits for its shareholders, however this is no longer the only objective that corporations have.<sup>357</sup> An increase in consumer awareness, coupled with environmental sustainability and corporate reputations have led to corporations widening their scope and mandate of their strategic focus.

A number of notable and commendable steps have been taken to promote the application of CSR in South Africa however corporations are still being relatively resistant in applying CSR principles despite the increase in terms of integrated report.<sup>358</sup> Many corporations have found that the implementation of CSR provides returns in the long term after giving due consideration to the fact that reputational risks are a current and rising concern for corporations.<sup>359</sup> The appropriateness of managements involvement in social issues, the consequences that directors could face if they do engage in such acts, the extent to which stakeholders interests should

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<sup>356</sup> Sachs, J. (2008) *The end of poverty and Common wealth: Economics for a crowded planet.* p1.

<sup>357</sup> Op cit fn 54 at p334.

<sup>358</sup> See fn 59. *A Review of Platinum Mining in the Bojanella District of the North West Province* Published: August 2012, [http://www.bench-marks.org.za/policy\\_gap\\_6.htm](http://www.bench-marks.org.za/policy_gap_6.htm). Accessed 13 February 13.

<sup>359</sup> Op cit fn 39 at p620

be taken into account still pose a serious concern in the application of CSR and it does not seem that these concerns will be resolved any time soon.

“The future of CSR will be largely shaped by corporate law and this is primarily due to the fact that corporations increase in the size and power.”<sup>360</sup> The South African government has implemented several sets of legislation to further the course of CSR. These instruments however have their down fall in that government does not have the resources to monitor compliance and though compliance with some pieces of legislation results in sanctions, many legislative provisions aren’t mandatory and application is largely dependent on the discretion of corporate boards.<sup>361</sup> I would recommend that existing legislation as effective as they are, be revised and tightened up to prevent transgressors from evading sanctions and that government look into creative ways to incentivize the implementation of CSR. It is argued that “morality is less prescriptive than the law,”<sup>362</sup> hence the application of CSR principles should not be left to the discretion of corporates and non-compliance should not be explained but sanctioned.

I would agree with Esser in her argument that CSR should not be dealt with by using “a one size fit all” approach.<sup>363</sup> The streamlining of processes and efficient use of resources may result in companies becoming more efficient and economically successful however over time these processes may require fewer employees than an inefficiently run corporation would. As stated earlier this approach maybe more suitable for implementation in developed countries. In South Africa, where the unemployment rate is on a rise<sup>364</sup> if these processes are implemented many more jobs could be lost. Hence

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<sup>360</sup> Korten, DC.(1996) *When corporations rule the world*, London Earth Scan. Reprint. p59 in Valor, C. (2005) *Corporate Social responsibility and corporate citizenship: towards corporate accountability*, Business Society Review. 110:2. p1991-212.

<sup>361</sup> Miles, L and Jones, M. (2009) *The prospect for corporate governance operating as a vehicle for social change in South Africa*.14:1. Deakin Law Reveiw.p71 in Op cit fn 54 at p334.

<sup>362</sup> Op cit fn 20 at p343

<sup>363</sup> Op cit fn 54 at p333

<sup>364</sup> See South Africa’s Unemployment rate. Available at: <http://www.tradingeconomics.com/south-africa/unemployment-rate> Accessed on 23 May 13.

corporations intending on implementing CSR measures should ensure that they align their implementation plans with the company's unique business model.<sup>365</sup> Esser and Horrigan both agree that "investors and stakeholders should be involved in the decision making process."<sup>366</sup> In the South African context this could prove to be a valuable tool in attempting to eliminate poverty and unemployment.

The B-BBEE Act and the EEA which were relatively good initiatives by government to facilitate development, to promote skills development, and to attempt to bridge the gap between the rich and the poor fell short of its goal. Compliance in terms of the B-BBEE Act is determined by asserting whether a corporation has complied with the 7 elements enlisted on the generic scorecard.<sup>367</sup> Many companies continue to regard the implementation of B-BBEE Act as no more than a mere technical matter. They have resorted to adopting a mere box ticking approach to meet the minimum requirements.<sup>368</sup>

The EEA set out to regulate affirmative action yet it ended up being a nightmare as several institutions applied affirmative action as a blanket policy to benefit only a certain race group.<sup>369</sup> This has been the case in South Africa insofar as corporations have sought the easy way out in terms of partaking in national transformation. Many corporates have actively engaged in questionable practices in an attempt of scoring easy points and deceptively acquiring a good BBBEE level. There is indeed a serious need for the implementation of mechanisms that encapsulates social, environmental and economic concerns into the day-to-day running of corporations. The concept of CSR encourages management to take into account the fact that they don't exist in isolation and that their sustainability is highly dependent on the relationship they create and maintain with their stakeholders. In a developing country like South Africa CSR could be a vital link between

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<sup>365</sup> Op cit fn 54 at p333

<sup>366</sup> Op cit fn 54 at p333.

<sup>367</sup> Op cit fn 136 at p167

<sup>368</sup> Op cit fn 136 at 167

<sup>369</sup> See case of Solidarity obo Barnard vs South African Police Services (2010) 5 BLLR 561 (LC)

corporates and government. Business and government share common problems to which CSR may be the solution.<sup>370</sup>

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<sup>370</sup> Op cit fn 54 at p333.

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